(1)

Supreme Court, U.S.

97 • 397 JUN 30 1997

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

RICHARD ANTHONY RINELLA, ESQ.,

Petitioner,

vs.

MARY ROBINSON, ADMINISTRATOR, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

WALTER P. MAKSYM, ESQ.
WALTER P. MAKSYM & ASSOCIATES
720 Enterprise Drive
Oak Brook, Illinois 60523-1908
Telephone: (630) 573-1900
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

160 pp

QUESTION PRESENTED

WHETHER A STATE'S DISBARMENT OF AN ATTORNEY FROM THE PRACTICE OF LAW ON ACCOUNT OF CONSENSUAL SEXUAL SPEECH, ASSOCIATION OR ACTIVITY WITH AN ADULT CLIENT OR FORMER CLIENT, LACKING A NARROWLY DRAWN PROHIBITIVE DISCIPLINARY RULE, VIOLATES CONSTITUTIONALLY PROTECTED LIBERTY, PRIVACY AND PROPERTY INTERESTS AND INFRINGES THE FIRST, FOURTH, FIFTH, EIGHTH, NINTH, TENTH AND FOURTEENTH AMENDMENTS.

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of Facts 2

Reasons for Granting the Writ 8

Conclusion 30

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Baggett v. Bullit, 377 U.S. 360 (1964) 16

Bates v. State Bar of Arizona, 433 U.S. 350 (1977).....9, 12

Bowers v. Hardwick, 478 U.S. 186 (1986) 29

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 16

Bronston v. United States, 409 U.S. 352 (1973) 28

Carey v. Population Services International, 431 U.S. 678 (1977)..... 28

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1979)..... 9

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)..... 16

Connally v. General Const. Co., 269 U.S. 385 (1926).... 16

Eisenstadt v. Baird, 405 U.S. 438 (1972).....25, 30

Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123 (1992)..... 16

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 11, 12, 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) ..11, 15

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 29

Harris v. Clyburn, 47 F.3d 1164 (4th Cir.), *cert. denied*, 116 S.Ct. 70 (1995)..... 14

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 14

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)..... 17

TABLE OF AUTHORITIES – Continued

Page

In re Corboy, 124 Ill. 2d 29, 528 N.E.2d 694 (1988) 27

In re Levin, 101 Ill. 2d 535, 463 N.E.2d 715 (1984) 28

In re Primus, 436 U.S. 412 (1978).....12, 14

In re Rinella, 175 Ill. 2d 504, 677 N.E.2d 909 (1997) 1

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 16

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 16

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 14

NAACP v. Alabama, 377 U.S. 288 (1964)..... 15

NAACP v. Button, 371 U.S. 415 (1963)..... 17

Niemotoko v. Maryland, 340 U.S. 268 (1951) 16

Olmstead v. United States, 277 U.S. 438 (1928)..... 30

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 29

People v. Barr, 929 P. 2d 1325 (1996) 15

People v. Wills, 71 Ill. 2d 138, 374 N.E.2d 188 (1978) 28

Reno v. ACLU, 521 U.S. ___ (1997)..... 16

Roe v. Wade, 410 U.S. 113 (1973) 25, 29

Romer v. Evans, 517 U.S. ___ (1996) 15

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 9

Skinner v. Oklahoma, 316 U.S. 535 (1942)..... 29

TABLE OF AUTHORITIES – Continued

Page

Smith v. Rockford, 408 U.S. 104 (1972) 17

Speiser v. Randall, 357 U.S. 513 (1958) 17

Spevack v. Klein, 385 U.S. 511 (1967) 9

Texas v. Johnson, 491 U.S. 397 (1989) 16

Suppressed v. Suppressed, 206 Ill. App. 3d 918, 565 N.E. 101 (1st. Dist. 1990) 18, 25

U.S. v. Acardi, 140 F.Supp. 383 (1956) 28

Wisconsin v. Constantneau, 400 U.S. 433 (1971) 11

Yates v. Milwaukee, 77 U.S. 497 (1870) 16, 20

Zablocki v. Redhail, 434 U.S. 374 (1978) 30

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 639 (1985) 9

U.S. CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, AMENDMENT I 1, 12, 29

U.S. CONSTITUTION, AMENDMENT IV 1, 29

U.S. CONSTITUTION, AMENDMENT V 1, 27

U.S. CONSTITUTION, AMENDMENT VIII 2, 19

U.S. CONSTITUTION, AMENDMENT IX 2

U.S. CONSTITUTION, AMENDMENT X 2

U.S. CONSTITUTION, AMENDMENT XIV 2, 29

TABLE OF AUTHORITIES – CONTINUED

PAGE

STATUTES & CODES

28 U.S.C. § 1257(a) (1988) 1

42 U.S.C. § 2000(e)(2) et seq. (1991) 13

Ill. Code Prof. Resp. Rule 1-102(a)(5) (1980) 2

Ill. Code Prof. Resp. Rule 4-101(b)(3) (1980) 2, 4

Ill. Code Prof. Resp. Rule 5-101(a) (1980) 2, 4

Ill. Code Prof. Resp. Rule 5-102(a) (1980) 2, 4, 5

Ill. Code Prof. Resp. Rule 5-107(a) (1980) 3

Ill. Code Prof. Resp. Rule 7-101(a)(3) (1980) 3, 5

720 ILCS 5/32-2 (1991) (formerly Ill. Rev. Stat. Ch. 38, § 32-2) 28

Ill. Rev. Stat. Ch. 110A par. 774 (1985) 22, 23

RULES

Ill. Rule Prof. Cond. 8.1(a)(1) (1980) 3, 28

Ill. Rule Prof. Cond. 8.4(a)(3) (1980) 3, 28

Ill. Rule Prof. Cond. 8.4(a)(4) (1980) 3

Ill. Rule Prof. Cond. 8.4(a)(5) (1980) 3

Ill. Sup. Court Rule 767(f) (1996) 19

Ill. Sup. Court Rule 771 (87 Ill. 2d R. 771) 3, 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

ABA, *Model Code of Professional Conduct*, as amended (1969) 22

ABA/BNA *Lawyers Manual on Professional Conduct*, (1995) 22

Holms, The Path of the Law, 10 Harv. L. Rev. 437 (1897) 30

Chicago Bar Association, *Joint Report of Committee on Professional Responsibility and Subcommittee on Attorney-Client Sexual Misconduct* (1991) 14

Karst, *The Freedom of Intimate Association*, 89 Yale L. J. 624 (1980) 25

Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 Georgetown J. Legal Ethics 209 (1996) 8, 14, 18, 19, 20

Webster's Ninth New Collegiate Dictionary, (1990) 2

TABLE OF APPENDICES

Item		Appendix Page
A-	Order of Illinois Supreme Court denying Petitioner's Petition for Rehearing filed March 31, 1997	App. 1
B-	Opinion of Supreme Court of Illinois Docket, No. 881887 filed February 20, 1997	App. 2
C-	Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission filed April 10, 1996	App. 23
D-	Dissenting Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission filed April 10, 1996	App. 53
E-	Chicago Bar Association, *Joint Report of Committee on Professional Responsibility and Subcommittee on Attorney-Client Sexual Misconduct* (1991)	App. 62
F-	Illinois Supreme Court Rule 767(f) (Relevant Sections re: Factors to be Considered-Reinstatement to Practice of Law) (1996)	App. 112
G-	Illinois Code of Professional Responsibility (Relevant Rules) (1980)	App. 113
H-	Illinois Perjury Statute (Relevant Sections) (1991)	App. 116
I-	Preamble to Illinois Rules of Professional Conduct, adopted February 8, 1990, effective August 1, 1990	App. 117

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray this Honorable Court for a Writ of *Certiorari* to review the Judgment of the Supreme Court of Illinois.

OPINION BELOW

On February 20, 1997 the Illinois Supreme Court, issued its opinion, [Docket No. 81887, App. B, *In re: Rinella*, 175 Ill.2d 504, 677 N.E.2d 909 (1997)] pursuant to a Report and Recommendation the Review Board of the Attorney Registration and Disciplinary Commission, filed on April 10, 1996. (No. 93 CH 387, App. B & C).

JURISDICTION

Pursuant to extension granted on July 10, 1997 pursuant to Rule 14.5 of this Court, this Petition is deemed filed within ninety days of the Illinois Supreme Court order entered March 31, 1997 denying Petitioner's Petition for Rehearing. (See App. A) This Court has jurisdiction to review the Illinois Supreme Court's decision by Writ of *Certiorari* pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of:

U.S. CONSTITUTION, AMENDMENT I:

> "Congress shall make no law . . . abridging the freedom of speech. . . . "

U.S. CONSTITUTION, AMENDMENT IV:

> "No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

U.S. CONSTITUTION, AMENDMENT V:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

U.S. CONSTITUTION, AMENDMENT VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONSTITUTION, AMENDMENT IX:

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. CONSTITUTION, AMENDMENT X:

"The power not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."

U.S. CONSTITUTION, AMENDMENT XIV:

"Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

FACTUAL AND PROCEDURAL BACKGROUND:

In 1993 the Administrator of the Illinois Attorney Registration and Disciplinary Commission (hereinafter referred to as the "Administrator"), filed a complaint seeking disciplinary sanctions against Richard Anthony Rinella, Esq. (hereinafter referred to as "Petitioner). In three counts arising out of his alleged sexual[1] relationships with three clients, Administrator accused Petitioner, of overreaching and violating current Rules 1-102(a)(5), 4-101(b)(3), 5-101(a), 5-102(a),

---

[1] The common and ordinary dictionary meaning of the term "sexual" has been and is broadly defined as: "1: of, relating to, or associated with sex or the sexes <~differentiation> <~conflict> 2: having or involving sex <~reproduction>" *Webster's New Ninth Collegiate Dictionary,* p. 1079 (1990)

5-107(a) and 7-101(a)(3) of the Code of Professional Responsibility and violation of Supreme Court Rule 771. A separate fourth count alleged that in he violated Rules 8.1(a)(1), 8.4(a)(4), 8.4(a)(3), and 8.4(a)(5) of the Rules of Professional Conduct and Supreme Court Rule 771 by giving false testimony before the Commission. (See App. B, C & D)

Count I alleged that in July of 1983 "Jane Doe" ("Doe"), retained Petitioner to represent her in a dissolution of marriage proceeding. Thereafter, it was alleged, he and Doe had a sexual relationship that began in approximately July of 1983 and continued throughout the duration of her representation. The complaint alleged that the relationship was "initiated" by Petitioner when he made "sexual advances" to Doe during her second visit to his office, and that Doe" . . . submitted to [his] advances because she was afraid that refusing to do would adversely affect [his] representation of her and because she could not afford to hire another lawyer after paying . . . his retainer." It alleged that by engaging in the conduct alleged in count I, "overreaching" occurred in violation of the Code of Professional Responsibility.

Count II alleged that while testifying under oath before the Commission, Petitioner falsely stated that he had never had sexual relations with Doe, that he had not had sex with her at her house, and that he had never had nude photographs taken of himself at her house. It further alleged that in June of 1993, while again testifying before the Commission, Petitioner retracted these denials after he was shown a nude picture of himself which he admitted was taken at Doe's house.

Count III alleged that in November of 1983, one Jeanne Metzger ("Metzger"), retained Petitioner to represent her in a dissolution of marriage proceeding. It alleged that in December of 1983, Petitioner scheduled an appointment with Metzger at his office to discuss her case, and that after she arrived and entered his office, he barred the door with a chair and initiated sexual activity with her. It alleged that she "submitted to his sexual advances because she believed that the quality of his representation of her would be adversely affected if she refused." It further alleged that he engaged in

sexual activity with Metzger on two other occasions thereafter, including once in January of 1984, at which time he asked her to supply him with nude pictures of herself. It was also alleged that during a court appearance in February of 1984, to which Petitioner had asked Metzger to bring an instant camera, he instructed her to answer all of his questions relating to her divorce in the affirmative, regardless of how she wished to respond. The conduct alleged in count III was claimed to constitute "overreaching."

Count IV alleged that one Sandra Demos "hereinafter referred to as "Demos"), retained Petitioner's law firm in 1980 to represent her in a dissolution of marriage proceeding. It alleged that although he did not have primary responsibility for Demos' case, he would call her frequently to ask her to meet him socially, and during these telephone calls would discuss with her items of a person nature that he could only have learned from reviewing her file. It also alleged that on one occasion around 1982, Petitioner made "sexual advances" to Demos and engaged in sexual relations with her in his automobile, after which he immediately took her to a motel room where he attempted to have sexual intercourse with her. It further alleged that she submitted to his "sexual advances because she believed that refusing to do so would adversely affect his firm representation of her." It charged that by engaging in the conduct alleged in count IV, Petitioner committed overreaching and violated Rules 4-101(b)(3), 5-101(a), and 5-102(a) of the Code of Professional Responsibility (87 Ill. 2d Rs. 4-101(b)(3), 5-101(a), 5-102(a)) and Supreme Court Rule 771 (87 Ill. 2d R. 771).

Answering the complaint, Petitioner denied the specific instances of sexual encounters with Doe and denied having engaged in any sexual relations with Metzger or Demos. As to the charge of perjury, he maintained that his answers did not amount to perjury because the answers were justified and seasonably recanted since any sexual activity with Doe occurred after her representation had ceased therefore that matter was not a proper subject of the Commission's inquiry but an unconstitutional invasion of his privacy. His motion to dismiss based primarily on the ground that no disciplinary

rule specifically forbade sexual relations between an attorney and client was denied. (See App. B, C & D)

REPORT AND RECOMMENDATION OF THE REVIEW BOARD:

The Board's Majority Report:

The Hearing Board found that Petitioner, a Harvard educated graduate of the University of Michigan Law School and a partner in the oldest, and what many consider to be the most prominent and reputable matrimonial law firm in Chicago, engaged in sexual relations with three clients and testified falsely before the Commission. The Board concluded that his actions violated the rules as charged in the complaint, with the exception of Rules 5-102(a) and 7-101(a)(3). After noting his unblemished record of three decades of practice, his professional ability and impressive character witnesses, the Hearing Board recommended that he be suspended for three years and until further order of court, an enhanced sanction.

The matter was appealed to the Review Board. In a split decision, the majority concluded that not all misconduct is or can be specifically proscribed in ethical rules, and interpreted the former rules, even though silent on the topic of sex, should put attorneys on notice that any sexual relationship with clients may be subject to discipline. After ruling that Petitioner's due process rights were not violated by their over-broad application of the older rules it rejected Petitioner's arguments that because the questions posed to him were ambiguous and his right to privacy precluded any inquiry into his prior private sexual life any allegedly false statements were recanted were not sanctionable. It affirmed the factual findings of the Hearing Board and its conclusion that the former rules of professional conduct should apply even though those rules did not specifically address the subject of sexuality. The Board concurred with the Hearing Board's recommendation that Petitioner be suspended from the practice of law for a period of three years, however it determined that a suspension until further order was not necessary. (See App. C)

The Board's Minority Dissenting Report:

A comprehensive dissenting opinion strenuously disagreed with the majority's application of the former ethical rules to sexual activities between lawyers and adult clients and agreed with the Petitioner that, absent any narrowly drawn rule governing sexual conduct between a lawyer and adult client, none of the then existing rules prohibited any consensual sexual behavior. Though the dissent noted that Petitioner made a false statement, he recommended a one year suspension stating that he would have dismissed Counts I, III, and IV because there was no sufficient notice or guidance to attorneys as to what, if any, sexual conduct is prohibited:

> The basis of this dissent is that the sexual relations which occurred here were consensual sexual acts between people well into adulthood. . . . [T]here was *no* threat or intimidating behavior identified by the complainants emanating from the respondent to the clients of withholding representation absent sex nor is there anything in this record which suggests that the respondent proposed sexual relations in lieu of fees. . . . The testimony of all three clients standing by itself point [sic] to *no* overt act or threat from the respondent. *The claimed "intimidation" felt was a subjective, personal state of mind, and none of the individuals communicated these subjective mind states to respondent.*
>
> * * *
>
> Should there be a rule in some form or another dealing specifically with sexual relations during representation? Perhaps. But what the rule, if any, should [be] and how it comes about (whether through written canon or case law) belongs to the Supreme Court after full airing of issues. *In the absence of a rule, the present rules should not be expanded to cover this conduct simply because the Hearing Board made a factual finding that [Rinella] received personal gratification.*

(Emphasis supplied) [f.n. omitted] (R.B. Dissent, pp. 4, 9-10, App. D)

DECISION OF THE ILLINOIS SUPREME COURT:

The Majority Opinion:

The Illinois Supreme Court (the "Court"), issued a decision approving in part and rejecting in part the recommendation of the Review Board and accepted the findings of the Hearing Board by adopting it's recommendation and suspended Petitioner " . . . from the practice of law for three years and until further order of . . . court" (See Court of Decision at App. B., Op. at pp. 12-13)

The Minority's Dissenting Opinion:

Though it concurred in part that no rule need have existed to inform Petitioner that his conduct violated the general rules, it argued the "until further order" sanction was "unfair" and "served no valid purpose." (App. B, Op. at pp. 13-16)

NATURE OF THE ACTION & RELIEF SOUGHT

Petitioner obtained leave of the Illinois Supreme Court to file exceptions to the Report and Recommendations of the Review Board. The Court thereafter issued a decision approving in part and rejecting in part the recommendation of the Review Board, approving the findings and recommendation of Hearing Board and suspending Petitioner from the practice of law for three years *and* "until further order" of court. Petitioner seeks review and reversal of that decision together with the reinstatement of his law license.

REASONS FOR GRANTING THE WRIT

A State May Not Disbar an Attorney from the Practice of Law on Account of Consensual Sexual Speech, Association or Activity with an Adult Client or Former Client, Lacking a Narrowly Drawn Prohibitive Disciplinary Rule, Without Violating Constitutionally Protected Liberty, Privacy and Property Interests and Infringing the First, Fourth, Fifth, Eighth, Ninth, Tenth and Fourteenth Amendments.

Introduction:

This court has not previously considered whether and to what extent the states are restricted by the constitution from regulating or disciplining lawyers and other state licensees for their non-criminal, private consensual sexual speech, association and activity. See: Mischler, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 Georgetown J. Legal Ethics 209, 211, 231-35 (1996).[2] The intolerant and puritanical view, that under some dubious unwritten rule or custom, every known type of consensual "sexual" interaction between an attorney and a client is absolutely prohibited was embraced by the Illinois Supreme Court by its recontextualization, and expansion and application of existing rules otherwise silent on the topic. Petitioner submits that this Court's guidance is

---

[2] Noting the " . . . oceans of ink . . . spilled on the subject of attorney-client sex . . . " in recent years by legal commentators, Professor Mischler scholarly work examines in depth the ongoing and unresolved firestorm of debate. In so doing she makes a compelling argument that an attorney has a personal "self ", that is beyond the reach of professional regulation and that the indirect control of women effected by an automatic *per se* ban constitutes a heavy intrusion on both client's and attorney's rights to privacy and freedom of intimate association. She notes further that the United States Supreme Court has never reviewed any state bar rules or decisions relating to an attorney's sexual conduct to determine whether they burden any fundamental right. 10 Georgetown J. Legal Ethics 209 at 231.

this Court and this unique case presents important and novel questions of constitutional law impacting nationally on all present and future members the legal profession and particularly the forty-seven states, such as Illinois that have yet to adopt and are considering adopting a rule on this controversial topic. *Id.* at 220.

ARGUMENT:

This Court has long held that a State cannot exclude a person from the legal profession in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment since the practice of law is not a matter of the "state's grace" and cannot be deprived except for valid reasons. *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). Indeed, all constitutional guarantees apply fully to attorney disciplinary proceedings because "lawyers also enjoy first class citizenship." *Spevack v. Klein,* 385 U.S. 511, 516 (1967).

Two decades ago in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) this Court held that not only do lawyers enjoy the same constitutional rights as do other citizens, but, their constitutional rights may be limited only under the "intermediate" scrutiny framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 564-565 (1979) if, and only if, the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is "narrowly drawn." Thereafter, in *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985) an attorney was sanctioned by the Ohio Supreme Court for various alleged acts of unethical conduct. Pertinent to this case, this Court held it would grant *certiorari* to review Mr. Zauderer's free speech oriented issue despite the fact he was reprimanded for multiple transgressions:

> . . . [A]ppellee suggests that because appellant received only a public reprimand – the least severe discipline that may be imposed on an attorney who

violates one of Ohio's Disciplinary Rules – the judgment below must be affirmed if any one of the findings of a disciplinary violation is sustainable. We disagree. The reprimand imposed on appellant incorporated the opinion of the Supreme Court of Ohio as well as the report of the Board of Bar Commissioners. Thus, the reprimand constituted a public chastisement of appellant for each of the offenses specified. A reprimand that specified fewer infractions would be a different punishment. . . . *Id.* at 636, fn.6.

* * *

In addition to ensuring fair notice, vagueness doctrine also guards against " 'harsh and discriminatory enforcement . . . against particular groups deemed to merit [official] displeasure.' " [citation omitted] Some commentators have suggested that vague disciplinary rules have been used as a tool for singling out unorthodox and unpopular attorneys for sanction. [citations omitted]

* * *

. . . [W]here "[t]he appraisal of an attorney's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question," and *where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct.* [citation omitted]

* * *

When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions even less sever than a public reprimand. Moreover, a public reprimand . . . exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands Zauderer as

> an unethical attorney who has violated his solemn oath of office and committed a "willful breach" of the Code of Professional Responsibility, and it has been published in statewide professional journals and the official reports of the Ohio Supreme Courts . . . . "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," due process guarantees must scrupulously be observed. . . . *Wisconsin v. Constantneau,* 400 U.S. 433, 437. . . . (1971). . . . *Id.* at 667, 669.

Most recently, in *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991) this Court reversed an order levying sanctions against an attorney because the rule in question failed to give clear notice to those who may have been subject to discipline and was so imprecisely drawn that discriminatory enforcement could become a real possibility, if not a certainty. This Court ruled that the broadly drawn rule operated as a "trap" to mislead him to conclude that he could conduct a press conference without fear of discipline. Justice Kennedy wrote for the majority:

> As interpreted by the Nevada Supreme Court, the Rule is void for vagueness. . . . Given this grammatical structure, and in the absence of clarifying interpretation by the state court, the Rule fails to provide " 'fair notice to those whom [it] is directed.' " *Grayned v. City of Rockford,* 408 U.S. 104, 112 (1972). A lawyer must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from safe harbor of the general to the forbidden sea of the elaborated.

* * *

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. [Citations omitted]. . . . *The question not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.*
>
> * * *
>
> At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the first amendment, and the First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See, *e.g., In re Primus,* 436 U.S. 412 (1978); *Bates v. State Bar of Arizona, supra.* We have not in recent years accepted our colleague's apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge on First Amendment freedoms. . . . 501 U.S. at 1048-1052 (Emphasis supplied).

This case is more egregious than *Gentile* where a specific rule attempted to limit speech by attorneys. Here, the "trap" was more insidious because not only were Petitioner's first amendment rights infringed, but his zone of privacy was invaded and he was severely disciplined in the absence of *any* established rule or guidelines even mentioning the subject of sex.[3] (App. pp. 19-20, 58).

---

[3] Petitioner strenuously denies all allegations of sexual relations occurring during any period of representation, but for purposes of this Petition his argument is based on the facts recited by the Court. Petitioner takes particular exception to the Court's mischaracterization of the evidence concerning consent. Each of the witnesses testified that she

At the time of the Court's ruling in this matter, the first ever proposed rules on the topic, were before it for consideration. In its opinion, the Court openly recognized the absence of rules and the need for a specific rule and guidelines. Nevertheless, the majority either ignored or failed to grasp the significance of the statement noted only in passing by the Court's partial dissenter: "[yet], few could disagree that a *per se* rule prohibiting sexual relations between an attorney and client during the course of the legal representation *would* provide the clearest guidance for practitioners. " . . . *[i]ncidently, our rules committee is on the threshold of fashioning a rule to address this very issue.*" (App. B, Op. p. 14) Agape as to how, in the midst of Petitioner's clamoring over lack of notice, guidelines or a rule on the subject of sex, the Court could make such a cavalier pronouncement when a rule which *would* provide guidance on the subject was in the works, it trudged on to its disingenuous conclusion.

There has never been an express prohibition in Illinois law which authorized lawyers to be sanctioned for their otherwise lawful private sexual activity,[4] so, holding that the bar could

---

participated in sex with Petitioner without any objection through words, facial expressions or body language. (R. 442-443, 646-647, 650-652, 846-847, 849, 949) The Court nevertheless found that the sexual relations were nonconsensual because of the witnesses' then unexpressed subjective reservations, and because of the "superiority" and "influence" presumed to exist by virtue of Petitioner's status as an attorney. The record thus provides feeble support for the Court's resolution of the notice problem, which rests on the conclusion that any reasonable attorney should have known that engaging in "nonconsensual" sexual relations with a client is unethical and might subject the attorney to discipline. Petitioner maintains that the Court's skewed interpretation of the facts is fundamentally unfair.

[4] Similarly, fraternization between the sexes is not categorically prohibited in the workplace even when the status of the parties suggests the possibility of undue influence or intimidation, as was alleged in this case. For example, under Title VII of the Civil Rights Act of 1964, [42 U.S.C, § 2000(e)(2) et seq. (1991)], actionable sexual harassment generally does not arise out of a consensual sexual relationship between a supervisor and a subordinate employee until after the consensual relationship ends and

reasonably have considered the conduct alleged in this matter to be "unacceptable" falls far short of what the constitution requires and ignores the fact that there is absolutely no evidence in this record establishing this assumption. Shunned were six year old pleas from the organized bar for a specific rule and guidelines on this murky and sensitive subject. See: The Chicago Bar Association's, *Joint Report of Committee Professional Responsibility and Subcommittee on Attorney-Client Sexual Misconduct,* (1991) (App. E). Contrary to the Court's assumption, the Chicago Bar Association Committee spelled out that Illinois law was silent on and has never had a prohibition or guidelines to which an attorney might refer with respect to sex *and proposed a rule permitting attorney-client sex in the absence of intimidation, undue influence or the client's ability to decide to engage in sex is impaired.* Hence, persons of ordinary intelligence could not be charged with ascertaining what was, or was not, "taboo" in these unchartered and turbid waters. Nevertheless, the Court issued its ephemeral edict without discussing the Chicago Bar's Report or the then pending petition of the Illinois State Bar Association seeking the adoption of a proposed rule[5] and in spite of its own Board's recommendation for a "full airing of the issues." (App. B).

Like most states, Illinois has an oligarchical disciplinary scheme that visits punishment on an *ad hoc* basis under vague phraseology. Few, if any, Illinois lawyers or bar applicants would have been familiar let alone could they be expected to live up to the rules, standards or court decisions of foreign jurisdictions in which they do not live or practice. Petitioner

---

adverse consequences befall the subordinate. See, e,g., *Harris v. Clyburn,* 47 F.3d 1164 (4th Cir.), *cert. denied,* 116 S. Ct. 70 (1995). Sexual speech or conduct in the workplace must first be unwelcome to be unlawful, and the burden is on the complaining party to establish unwelcome-ness according to an objective standard. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986); *Harris v. Forklift Sys., Inc.,* 510 U.S. 17 (1993). Implicit in these requirements is the recognition that adults have a fundamental right to pursue interpersonal relations in any setting. See: 10 Georgetown J. Legal Ethics *supra* at 230-231; *In re Primus, supra* at 414-16.

[5] See: 10 Georgetown J. Legal Ethics *supra* at 218-19.

asserts that the State may not rummage back more than a decade, subject him to the third degree, pry into most innermost aspects of his intimate life and then arbitrarily condemn him to endure ruinous sanctions on account of private mutually erogenic interactions with other consenting adults. Attempts by the state to control or prevent such activities may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *NAACP v. Alabama,* 377 U.S. 288, 307 (1964) (burdens on the freedom of association are subject to the "closest scrutiny"); see also: *Grayned, supra* at 108.

Everyone involved in this case has conceded that no specific bar or guidelines exist in the area of sexuality. These admissions combined with the differing views of the Review Board's "reasonable men" as to whether the alleged behavior could be disciplined render compelling proof that the process lacked adequate notice. Akin to *Gentile,* the words and phrases in issue in the instant case are without doubt vague and ambiguous: "overreaching," "posing a significant risk of damaging the clients interests," "tending to bring the legal profession into disrepute," "undivided fidelity," "conduct prejudicial to the administration of justice," "personal interests," "unethical," or "unprofessional," are hardly bright beacons for anyone within their reach. Such vague and equivocal devices, when used to obtain even supposedly desirable results, are inherently repugnant to our Constitution. See: *Gentile, supra; Romer v. Evans,* 517 U.S. ___ (1996) (state's attempt to suppress or deny a person or class of persons any right or privilege on account of their sexual status, orientation, associations or non-criminal sexual behavior abridged freedom of association and denied equal protection).

Such deprivations must, as occurred in this case, inevitably result from the application of such subjective interpretations and preferences, not law, to produce very divergent outcomes.[6] The void-for-vagueness doctrine was designed to

---

[6] By contrast, consider the recent Colorado Supreme Court case of *People v. Barr,* 929 P. 2d 1325 (1996). There, a matrimonial lawyer with a

save regulated parties from having to rely on the grace of even "well-intentioned prosecutors." *Baggett v. Bullitt,* 377 U.S. 360 at 373 (1964). See also: *Keyishian v. Board of Regents,* 385 U.S. 589, 599 (1967); *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988).

It is intolerable for government to leash upon any person the uncontrolled fiat of its operatives especially in the areas of intimate speech and relationships among consenting adults or to allow serious sanctions to turn on the application of undiscernible individual value systems. See: *Yates v. Milwaukee,* 77 U.S. 497, 505 (1870); see also: *Texas v. Johnson,* 491 U.S. 397, 414 (1989). By delegating unbridled discretionary power and failing to grasp or comprehend the magnitude of the speech, liberty and privacy interests at stake, the Court effectively spared itself from confronting Petitioner's constitutional safeguards. See: *Forsyth County, Georgia v. The Nationalist Movement,* 505 U.S. 123 (1992); *Niemotoko v. Maryland,* 340 U.S. 268 (1951); see also: *Reno v. ACLU,* 521 U.S. ___ (1997) citing *Gentile, supra.*

As a matter of basic due process *all* of us are entitled to be informed as to what a statute or a rule commands or forbids. *Lanzetta v. New Jersey,* 306 U.S. 451 (1939). It is well settled that: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." *Connally v. General Const. Co.,* 269 U.S. 385, 391 (1926); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). If the mission is to neuter the profession by ridding it of all manner of philandering, seduction and sensual expression, so be it. But, first, let there be a loud warning shot fired across the bow of the Bar in the form of the

---

history of discipline who rather than challenging the process, "plea-bargained" the allegation of having engaging in sexual intercourse with one of his clients and received a modest suspension of only three months due to his "cooperative and remorseful attitude." One might wonder whether such tenuous – decade stale – charges would have been dredged up and a hunt initiated in this case, with the resulting disparate result had there not been the lure of bagging a vociferous "trophy lawyer."

enactment of a narrowly drawn rule which proscribes specific identified conduct and articulates precise guidelines which will give fair notice of that numinous goal. The requirement of clear notice applies with particular force here because rights of speech and privacy are at stake in the context of a pluralistic society. See: *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Smith v. Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Just as vague statutes cause potential speakers to "steer far wider of the unlawful zone," this decision can repress an entire category of intimate indigenous human behavior which is not and could not be specifically outlawed " . . . than if the boundaries of the forbidden areas were clearly marked. . . . " See: *Bullit*, at 372; (see also: *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Telling proof of vagueness is further revealed by the inability of the Boards, the Court and even the Chicago Bar Association, Petitioner's peers, to determine the meaning or ambit of the general rules or define, with any specificity or precision, the exact parameters as to what "sexual" conduct should be or is sanctionable. With the admitted lack of mention or prohibition in the Code or Rules relating to subject of sexuality and intimate relations of any type, the Administrator and her counsel were left to resort to and advocate their own personal values and viewpoints. So, after selectively borrowing from an arsenal of generalities they constructed an obtuse "book" and threw it at Petitioner in hopes it would "stick" with the mortar of the current "politically correct" social climate and the trowel of the unfettered discretion.

Who is to say when and on what criteria the guillotine will fall next? In this vacuum the danger lurks that considerations of public pressure, personal prejudice and bias rather than the rule of law might well have influenced the outcome in the absence of a specific rule, as Petitioner submits was the situation in his case. He urges this court to examine whether he may have been deprived of his livelihood for male-chauvinist or paternalistic reasons rather than for violation of a specific law.

In so doing, this Court is asked to note that, like all governments, the State of Illinois must be deemed to be asexual.[7] It should not be interested in Petitioner's speech or intimate adult associations, except to the limited extent it may first find it absolutely necessary and in the public's interest to regulate.

In the instant case the vagueness, association and privacy problems are especially pronounced and troublesome for at least eight compelling reasons. First, so-called "violations" of the amorphous and unwritten moral rules, which are supposedly "obvious" and apply only to a special class of citizen carries with them ominous penalties including loss of livelihood. Uncertainties abound as to the scope and manner of treatment of lawyers who may find reason to dread even the thought of the disciplinary process, thus making it more likely to result in radical self-censorship of behavior, speech and even thought. Here, Petitioner labors under the enhanced penalty of indefinite suspension "until further order", a sanction tantamount to disbarment, whereby his very living is held ransom under a draconian scheme some members of the Review Board and Court recognized as nonsensical. So long as he desires to again engage in the practice his law license this hostage situation can persist even though the dissent noted that "this is not conduct which is amenable to assessment of change" or "measure of improvement" would be "ineffective to assess . . . his fitness to practice law" . . . "is simply

---

[7] However unlike the state, Petitioner is also a sexual being, who by taking an oath of attorney did not also take vows of chastity, poverty or obedience, join a celibate priesthood or cult, subscribe to a healing profession, relinquish or forfeit the pursuit of happiness, or his rights to due process, equal protection, speech association or privacy. See: *Suppressed v. Suppressed,* 206 Ill. App. 3d 918, 565 N.E.2d 101, 105 (1st. Dist. 1990) (holding that Petitioner's duty to provide competent legal representation or his ability to deal with legal problems does not subject him to a malpractice claim merely because he is claimed to have engaged in consensual sex with a client and does not transform him or other attorneys, neither trained nor qualified in healing professions, to treat or be called upon to handle well-being issues); *accord*: 10 Georgetown J. Legal Ethics at 213, 224-225, 244-259.

unfair" . . . "effects a baseless continuation of the suspension" and "serves no valid purpose." (App. pp. 15-16) To rescue it, he must, under Illinois Supreme Court Rule 767(f), (App. F) having done penance, with a pure heart, an appropriate "right" attitude of profound humility, sufficient remorse, believable contriteness and "hat in hand," beg his adversary, judge, jury and executioner for reinstatement. See Ill. Sup. Ct. Rule 767(f); (App. F). This ancient process, which the estimated would take at least two or more years beyond the three-year suspension, includes an incomprehensible test of the "right" speech and intimate associations and conduct to which he must subscribe should he have any hope of regaining his calling. (App. B, pp. 21-22). All of this offends not only Due Process but the spirit of the Eighth Amendment since he is condemned to face the cruel, unusual, interminable and humiliating prospect of not only suffering an unending inquisition into his most sensitive and private recesses of his being, but of having to explain and justify, in a void, its every aspect together with his speech and associations occurring during his suspension. This notwithstanding the fact he will be prohibited from maintaining a clientele and despite the fact that he has represented a thousand other clients, most whom were women, whom he represented without incident or complaint since the last relevant alleged intimate contact in 1984. (R. 65, 66) This Herculean chore and Promethean punishment is reminiscent of and finds analogy only in the ordeal visited upon Sisyphus.

Second, as Professor Mischler astutely observes: "Adult attorneys *and clients* enjoy [the] fundamental right to engage in consensual sexual activity," "choose a sexual partner . . . and decide matters of child bearing." 10 Georgetown J. Legal Ethics 209 at 232-234. Further, since "[c]onsensual sexual activity between adult attorneys and clients is not inherently at odds with . . . professional representation . . . the profession has no justification for prohibiting it. . . . " *Id.* at 227-234. Moreover, she alerts us to the fact that vague axiomatic norms or blanket prohibitions reflect deep-seated societal views toward women and sexuality whereby they are culturally defined as immature, dependent, passive, easily-influenced, illogical, unable to separate feelings from ideas" – merely the objects of "conquest"

and "a less powerful person." She opines that "[t]he fallacy at the base of the *per se* ban is the concept that all sex . . . involv[es] [an] abuse of power" because "[t]he client is presumed vulnerable, immature, in need of protection and unable to make rational decisions." Therefore, since "attorney client sex is not inherently harmful" such rules can only be applied by creating "absolute presumption[s][8] of harm" and "abuse of power" implicitly premised on falsehoods that "reek of paternalism and perpetuate stereotypes of female weakness and dependence" by assuming that women will always be considered "helpless waifs forever deprived of the ability to think rationally and are therefore incapable of giving informed consent to a sexual relationship. Such conclusive presumptions further imply that women are simply incapable of dealing equally with men in the professional-client context thereby depriving her of the ability to consent to a sexual relationship with a partner of her choosing. *Id.* at 235-241. In this bigoted mindstate the attorney is "powerful in all areas," and "knight-in-shining-amour-ism" and condescending stereotyping are perpetuated. (*See*: e.g., App. C, pp. 46-47). "Consensual egalitarian sex is beyond comprehension." *Id.* at p. 238, 241. If this were not enough, she reminds us that all this not only heavily intrudes into an area of privacy protected by the constitution but is exaggerated where a female divorce client is involved. Then "[t]he the image of the vulnerable, needy, childlike woman is nowhere more prevalent. . . . [h]aving lost her husband, she is described as emotionally unstable, feeling unattractive, and anxious to receive the attention of another man." * * * "This image is so saturated with stereotype it is difficult to 'conjure up' the same scene with a male, rather than a female, divorce client." *Id.* at 240-241, 268. (*See also*: App. B, p. 14). In summary, having dismantled a hierarchical world view that does not admit the possibility that an attorney and client are capable of having sexual interests on a par, regardless of legal knowledge, she arrives at the wise and conservative conclusion that when it comes to consensual sex between attorney and client,

---

[8] Conclusive presumptions are strongly disfavored as violative of due process and were rejected by this Court over a century ago in *Yates v. Milwaukee,* 77 U.S. 497, 505 (1870).

despite any public's distaste for lawful conduct, an outright ban is neither warranted nor constitutional and therefore "the bar has no business in the bedroom." *Id.* at pp. 230, 234, 238, 268.

Third, Americans are not ordinarily accustomed to facing loss of their livelihood for engaging in consensual sex. The practice of law is far beyond a mere "privilege" which can be limited or terminated at will or whim, but rather, is a unique licensure implicating property rights and liberty interests that inure along with greater economic and social value that likewise mature over the years. Once admitted, a lawyer's other career opportunities diminish with the passage of time, age and exclusive devotion to the "jealous mistress" of the law. Therefore such career should not be "jilted" on account of stale commiserations.

Fourth, matrimonial lawyers in particular and attorneys in general are called upon to discuss, in various contexts, matters involving sex as well as the intimate lives of not only their clients but their spouses and others. Those circumstances subject *them* to the risk of becoming vulnerable to all manner of potentially false and exaggerated accusations, not to mention now being fair game to the possibility of extortion by avericious clients. Therefore, lawyers must, in the absence of narrowly drawn standards, try to radically and unnaturally tailor both their private and public speech, intimate associations and behavior to comport with what the least tolerant and most sensually suppressed or repressed board member or justice may, for whatever personal reason or consideration, deem "sexually" impermissible a score or more years into the future. In the absence of a succinct rule of law and adequate standards, practitioners must fathom the potential myriad of liberal constructions or conservative bents a particularly intolerant, hypersensitive, provincial or puritanical reviewer could find, possess or invent. Without a discernable line having been drawn, they are left perilously wide-open to unpredictable sanctions. Even attorneys who eventually marry or are married to a client (or another attorney-client) would be imperiled.

Fifth, as precedent transposed into other professional and occupational contexts others licensed by the state such as accountants, pharmacists, electricians, auto dealers, stock brokers and real estate agents, etc., who may develop any of an infinite number of

possible kinds of intimate associations with their clients or customers are now subject to the same tyrannical, financial and emotional jeopardy, the linchpin of which, at lest in this case, seems to be a condescending, archaic, if not naive and profound misunderstanding of sexuality in general and the volitional abilities of women in particular.

Sixth, the Court, by retroactively enlarging Petitioner's duties under the Code of Professional Responsibility in effect during the 1980's to include upholding "values" and achieving "goals" that never appeared in the 1980's Code but rather were announced for the first time in the preamble to the current Rules of Professional Conduct (which did not become effective until August 1, 1990). *See,* Appendix B, p. 12; App. F. Not only was the preamble not in existence during the relevant time period, but also, the new regime to which the preamble pertains departs significantly from the previous system of cannons, ethical considerations and rules in that the values articulated in the 1980's Code were characterized as "aspirational" and not intended to provide a basis for discipline.[9]

---

[9] The Court officially adopted the Illinois Code of Professional Conduct on June 3, 1980 (the "1980's Code"), with an effective date of July 1, 1980. *See,* Ill. Rev. Stat. Ch. 110A foll. ¶ 774 (1985). The 1980's Code was based on the ABA *Model Code of Professional Conduct* ("Model Code") which was adopted in 1969 and amended several times, with the last amendments adopted in 1980. *See*, ABA/BNA *Lawyers' Manual on Professional Conduct,* 1:301-02 (1995). The Model Code consisted of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. *Id.* at 1:301. According to the Preliminary Statement to the Model Code, the Canons are statements of axiomatic norms; the Ethical Considerations are "aspirational" in character; and the Disciplinary Rules, unlike the Ethical Considerations, are mandatory and intended to state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *Id.* at 1:302. The Ethical Considerations of the Model Code were never officially adopted by the Illinois Supreme Court. See, Ill.Rev.Stat. Ch. 110A foll. ¶ 774 (1985). The 1980's Code was entirely replaced with a new system in 1990 based on the ABA *Model Rules of Rules of Professional Conduct* thus eliminating ethical considerations and canons altogether but adding the *new* preamble upon which the Court so heavily relied in its 1997 opinion to saddle Petitioner with notice effective in the early 1980's. (*See* App. B, p. 13; App. F).

Indeed, the 1980's Code expressly provided that an attorney is subject to discipline only for a violation of the disciplinary rules as set forth in the Code. *See,* Ill. Rev. Stat. Ch. 110A foll. ¶ 774 (1985). Thus, the Court's retroactive application of the new preamble to Petitioner's case is no less a constitutional wrong than if members of the Court had put Petitioner to pillory for failing to subscribe to their own previously-unspecified "values". Such "values" were applied to facts which ensued well over sixteen years ago in one instance and thirteen years in the others in what arguably was an entirely different and more permissive social and sexual climate. The new preamble [the effective date of which was omitted from its opinion] was misapplied to bolster and justify the false conclusion that the Petitioner "had" notice.

Seventh, the Court's broad brush ruling accented by its ambiguous criteria of "obviousness" harbors the danger of suppressing all, even otherwise lawful freedoms of sex-related speech and association because they inarticulately run the gamut of "sexual" behavior. Under it's silent sweep, not only such unspecified activities as coitus, hand-genital or oral-genital contact, but potentially all manner of other legitimate, private and in some instances public expressive or affectionate communication, behavior or bodily contacts, including but not limited to compliments, same or opposite sex hugging, hand-holding, kissing or blowing kisses, flirting, dancing, [even at a client's wedding], gender-related humor, or even innocent and natural touching, [sometimes ethnic or spontaneous in nature] not to mention, socializing, dining, dating, cohabiting with or even marrying a client or former client, or representing a spouse after marriage, i.e., any of which acts might tend to identify one as having heterosexual or homosexual tendencies, are conclusively forbidden under the guise of the generalities employed in this case.

Eight, beyond all of this, in addition to no notice before the fact, there were no utterances of objection or protest during the fact by the vicissitudinous accusers. Nowhere does the Court set forth exactly what it is about this particular case that makes the conduct inherently harmful to clients or so "obviously unacceptable" to any reasonable member of the bar. Instead, the attention shifted to a purblind anti-hedonistic tact and focused upon the presumed personal "gratification" (pleasure or satisfaction) that may have been

mutually derived from the alleged encounters as a substitute excuse to make an example of him and thus strike fear in the bench and bar. This when, as to Metzger, there were three alleged incidents occurring in late 1983 and early 1984 and as to Demos one alleged incident in 1982 with no evidence that either of them ever indicated any lack of consent in any manner whatsoever when the made their libidinous choices. (C. 149-150) "Doe," likewise never expressed or indicated any lack of assent at any time prior to the end of the attorney-client relationship (when Petitioner denies any sexual conduct) or after it had terminated[10] (when Petitioner admits sexual conduct).

---

[10] The Court's dissent also mischaracterized the record by stating the sexual episodes lasted no ger than did the period of the legal representation." (App. B, p. 14). The evidence as to Doe is to the contrary. She testified that her representation began in [mid] 1983 and ceased in 1984 *but she had sex with Petitioner several times a year thereafter until 1988.* (R. 442-43). The evidence, which consisted of one isolated incident in 1982, three instances during a three month period ending in early 1984, and a relationship which (regardless of when it began) continued long after the attorney-client relationship had clearly ended. Further, despite the dissent's error in describing the sexual advances as being "unwelcome," the record is devoid of evidence of any expression of "unwelcome-ness" or want of consent. The alleged conduct upon which the Review Board based its conclusions included, as to Doe, are "a few incidents a year beginning in 1983 through [mid] 1984." The Hearing Board, affirmed by the Review Board, did not concern itself with sexual conduct beyond that date, but only with alleged incidents during the period of representation. (C. 159; H.B.Rpt., p. 36, footnote 9). However, the evidence was clear that this intimate relationship; regardless of when it began, continued sporadically for some *four years after* the attorney-client relationship had ended. Assuming, *arguendo,* the allegations to be true, the single Demos incident occurred in 1982, well over a decade before charges were instituted (R. 332), with a client whose case was over about two months later and was indisputably not handled by Petitioner. Even the dissenting justice ignored the critical constitutional issues by concluding that *no rule need here exist* to inform Petitioner that his conduct was violative of the rules of professional conduct because it was "obviously" improper. (App. B, p. 14) The decision also fails to address how an attorney can be disciplined for the uncommunicated or withheld subjective interpretation of another, thereby

In its discussion of "overreaching," the decision states, without explanation as to exactly how he was able to accomplish such a Svengalian feat, that he somehow: *"caus[ed] the clients to believe that their interests would be harmed if they refused his advances. . . . "* in the absence of proof of any intent "to cause" such a "belief," or any way to discover that there was such an unexpressed belief. (App. B, Op., at 10-11) The decision fails to explain exactly how uncommunicated beliefs in the recesses of another's mind can be discovered, particularly when the others are consenting adult members of the opposite sex possessed of free will and all their faculties. Undaunted, the dissenting member of the Review Board stated the following critical facts ignored by the majority:

> " . . . the sexual relations which occurred here were consenting acts between people well into adulthood. . . . [t]here was no threat or intimidating behavior . . . to the clients of withholding representation absent sex nor is there anything in this record which suggests that the respondent proposed sexual relations in lieu of fees. . . . The testimony of all three clients standing by itself point [sic] to no overt act or threat from the respondent. *The claimed "intimidation" felt was a subjective, personal state of mind, and none of the individuals communicated these subjective mind states to respondent."* (Emphasis supplied) [f.n. omitted] (Dissent, p. 4., App. D)

Glaringly missing from the Court's opinion is any recognition that of the axiom mature adults possess the ability and freedom to choose the form of and initiate or terminate such intensely personal bonds. See, generally, Karst, *The Freedom of Intimate Association,* 89 Yale L. J. 624 (1980); cf. *Eisenstadt v. Baird,* 405 U.S. 438, 453, 463 (1972); *Roe v. Wade,* at 410 U.S. 113 at 153 (1973).

Following litigation[11] and when visions of El Dorado went awry, the three sought and obtained his low-tech lynching,

---

throwing female responsibility to the wind due to apparent male-chauvinism.

[11] *See generally, Suppressed, supra* (discussed in 10 Georgetown J. Legal Ethics 209 at 224-225) which affirmed the Circuit Court's dismissal of Metzger's million dollar plus civil action holding that she failed to state a cause of action against Petitioner for "breach of fiduciary duty," a charge

memorialized by a published opinion, that, while castigating him, necessarily viewed them as puerile and inept. The day has come to

---

later resurrected to discipline him. Ironically, Petitioner was severely disciplined in the absence of a specific rule for the very same acts that Metzger could not persuade any court constituted a civil wrong. Though, in the context of this Petition, it is impossible to make an in depth presentation of the mountain of evidence that undermined his accusers' credibility and demonstrated the consensual nature of all the alleged conduct, a fair perspective can be gained by noting a few highlights disclosed by the record. Metzger admitted that her relations with Petitioner were consensual and that she undressed herself and climbed into bed and had sex with him at a stranger's apartment. Her testimony was also thoroughly impeached by the testimony of two licensed Illinois attorneys. (R. 128, 646-47, 650-52, 656, 701-02) College educated Doe filed no less than six separate suits against Petitioner [including a Federal "R.I.C.O" action], each of which were dismissed for lack of merit. (R. 516-17) She admitted that her relationship with Petitioner ended and she filed her first suit for damages when she suspected he was involved with another woman and Petitioner declined to represent her in 1988 referring her to another attorney after she initiated sexual relations with him in 1986. This after she mailed sexually provocative materials to Petitioner at his office, admitted having consensual sexual relations with him over a span of years, frequently praised him to other women, never complained about any "misconduct," referred other women to him, sent Christmas cards to both he and his wife at their home and even invited his wife to tea. (R. 106, 436, 442-43, 458-60, 505, 507-08, 516-17, 573, 846-47, 849, 949) Though Demos, the holder of a master's degree, was once represented by Petitioner's firm, at no time did he ever provide her legal services nor was he aware that she had been a client of his firm until he was notified of her complaint by the Administrator because each lawyer in his firm generally handled their own cases. (R. 128, 130, 138, 144, 317, 330, 369-70) Demos admitted she was represented by Petitioner's late father. Contrary to her initial testimony at an earlier hearing, she later admitted that there was no information in her file about her sex life but that she hoped that by having drinks and consensual sex with Petitioner he might persuade his father to "put a little more effort" into her case. She admitted to having only consensual sex with Petitioner and acknowledged that he never forced her to do anything. She said she later complained because she "changed her mind," suspecting that Petitioner's late father "made a deal" with her former husband and may have settled her case "cheaply" because she

surmount antiquated myths and illusions and recognize that, although the sexes may dwell in distinct paradigms of reality and possess quite different structures of interpretation, as autonomous human beings, they each possess, at all times and under all circumstances, the absolute power of choice notwithstanding the happenstance of gender.

Here, Petitioner's indefinite suspension is so fundamentally unfair as to constitute a *per se* violation of his right to due process since lawyers, like anyone else, are entitled to be informed as to what a statute or rule commands or forbids. *Lanzetta, supra.* The opinion and sanctions are even more puzzlingly unjust when contrasted to its recent ruling in *In re Corboy.*[12]

The Court's ruling regarding the Petitioner's denials of the alleged sexual conduct is also in error. Petitioner's answers were compelled in such a highly distressful setting compounded by the tribulation of being propounded incredibly intrusive questions by a team of inquisitors about his intimate relations. Such inquisition should not only be held improper as an invasion of privacy, but inadmissible under the Fifth Amendment. Most certainly, had a female attorney been the target such would be decried far and wide as an "outrage." The Court's rebuke that the immediate recantation was "not voluntary" but merely because a photo was adduced fails to understand the Illinois law.[13] Questions prying into Petitioner's

---

feared he may have found out she was having a sexual relationship with his son. (R. 333, 335, 337, 338, 355, 343-44, 348, 351, 354, 352-355)

[12] In *Corboy,* 124 Ill.2d 29, 528 N.E.2d 694 (1988), a nationally renowned Chicago personal injury attorney escaped discipline for making loans to the "ailing mother" of a judge before whom he practiced. In that case the Illinois Supreme Court held that it would be "unfair" to sanction him despite the existence of a clear specific rule barring such conduct because he acted without the guidance of precedent or settled opinion. Even if one could make such hypertechnical delineations in the absence of guidelines, this incongruous decision renders no assistance in ascertaining just what "innocent mistakes" in this area might be or why the Court appears willing to be more "lenient" of them. (App. B, p. 14)

[13] The Illinois perjury statute does not distinguish "voluntary" from any other type of recantation. So, under the logic of the perjury statute there

zone of privacy would, at a minimum, have first needed to distinguish between a times when Doe was and was not a client, since, it could be assumed that consensual intimate conduct with a non-client was not prohibited. It was also improper for the Administrator to grill Petitioner as to whether he had ever discussed or had lawful sex with a former client as it would have been to ask a female lawyer if she had ever had a lawful abortion, since what one does with one's own intimate or procreative life, when otherwise lawful, is simply not the proper subject of any state inquiry. See: *Carey v. Population Services International,* 431 U.S. 678, 711 (1977).

As is aptly pointed out by the dissent, the "until further order" sanction makes no sense here and has been specially reserved for certain types of cases that are particularly amendable to later demonstration of rehabilitation. (App. B, Op. at 14-16) Such cases usually involve restitution or a client who labors under a legally recognized "disability," or where the overcoming of an identifiable shortcoming is subject to observation and proof. See, e.g., *In re Levin,* 101 Ill.2d 535, 463 N.E.2d 715 (1984). But here the charged conduct occurred well over a decade ago, and there is no evidence

---

could not have been a criminal prosecution and accordingly neither Rule 8.4(a)(3) nor rule 8.1(a)(1) were violated by reason of Petitioner's prompt recantation prior to ruling. Under the holdings in *Bronston v. United States,* 409 U.S. 352, 362 (1973) and *People v. Wills,* 71 Ill.2d 138, 374 N.E.2d 188, 192 (1978) it was the duty of the interrogator, not the witness, to clarify the propounded questions. A questioner's words must be read in their context. The decision fails to discuss the context of the questions put to the Petitioner or deal with contention that he was not required to answer questions regarding his sex life if those questions sought information regarding conduct with another consenting adult who was not a client when the conduct occurred. Rule 8.1(a)(1) and 720 ILCS 5/32-2 (1991) (formerly Ill. Rev. Stat. Ch. 38, § 32-2) contain a materiality requirement. Responding falsely to a question the examiner has no right to ask or which does not relate to the proper function of the examining body constitutes an invasion of privacy does not amount to perjury. See: *U.S. v. Acardi,* 140 F.Supp. 383 (1956). If statutes of limitation and laches applied to disciplinary matters, none of the charges against the Petitioner could have been maintained. Surely, the doctrine of fundamental fairness should be interpreted to bar such rancid claims.

of other similar conduct or prior discipline. Neither prejudice nor harm of any kind was charged as to Doe or Demos and there was a specific finding that no such prejudice befell Metzger. Moreover, none of Petitioner's accusers were ever considered to be accountable for their creation of assigned authors[14] for their most deply intimate decisions and actions.

In *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965) this court held that Fourteenth Amendment as applied to the states " . . . The First Amendment has a penumbra where [sexual] privacy in general and a person's [woman's] freedom to make private decisions concerning reproductive practices in particular [are] protected from government intrusion" and addressed the contours and limits of government's ability to involve itself in the private intimate lives of its citizens." *See also: Roe* at 129. The Equal Protection doctrine demands that these safeguards be applied uniformly to males as well as females. In *Bowers v. Hardwick,* 478 U.S. 185, 186, 206, 214 (1986), Justice Blackmun wrote: " . . . The essence of the fourth amendment is . . . 'the invasion of his indefeasible right of personal security, personal liberty and private property. . . . " and "depriving *individuals* of the rights to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do." *See also: Skinner v. Oklahoma,* 316 U.S. 535, 536-543 (1942) (the intimate reproductive rights of a male are a "sensitive and important area of human rights". . . . "). *See also: Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973) (a state may not ban consensual adult heterosexual activity in private simply due to lack of adherence to a

---

[14] The term "assigned author," as here coined, refers to that person, circumstance, reason or thing to which one ascribes or designates source or cause ["author"] to assume, bear or take responsibility, credit or blame for ones own volitional decisions, choices and/or actions in order to create the illusion or make it appear or seem to themselves or others, for whatever reason – expedient or desirable – that they are not the source and generative cause in the matter of their choices, interpretations, actions and/or experiences, when in truth, fact and reality they are such source or cause.

presumed value system, nor can any supposed governmental interest justify invading the hearts and minds, pleasures and emotions of those who choose to live their lives differently).

If a State imposes a requirement that "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is *closely tailored* to effectuate only those interests." *Zablocki v. Redhail,* 434 U.S. 374 (1978). *See also, Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J. Dissenting) (" . . . [T]he most comprehensive of rights and the rights most valued by civilized men" . . . [is]. . . . "the right to be let alone."); see also: *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972). A century ago the great Justice Holmes taught that justification for an unwritten rule even if "obvious" or "laid down in antiquity" is "revolting" if it persists out of a "blind imitation of the past." *Holmes, The Path of the Law,* 10 Harv. L. Rev. 437 (1897). Therefore, notwithstanding the Court's bold assertion that its unwritten rule is "obvious," in reality it is no more than an unconstitutional enigma which fails to warrant Petitioner's ponderous penalty.

Conclusion:

Given that this Court has not yet spoken to these important issues, review and guidance will be of enormous value to the public and legal profession in resolving the ongoing national debate as to what notice must be given and what limits, if any, states can impose in the area of attorney-client sexual relations. As in the past, this Court should not hesitate to review Petitioner's discipline because it was first rendered by the Illinois Supreme Court and therefore he has no other available recourse for redress or review of that decision save this Court.

For all of the reasons above stated, Petitioner respectfully prays that this Honorable Court grant *Certiorari.*

Respectfully submitted,

Walter P. Maksym, Esq.*
Attorney for Petitioner

*Counsel of Record
© 1997

APPENDIX

TABLE OF APPENDICES

Appendix Page

Item

A- Order of Illinois Supreme Court denying Petitioner's Petition for Rehearing filed March 31, 1997 ..... App. 1

B- Opinion of Supreme Court of Illinois Docket No. 81878 filed February 20, 1997 ..... App. 2

C- Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission filed April 10, 1996 ..... App. 23

D- Dissenting Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission filed April 10, 1996 ..... App. 53

E- Chicago Bar Association, *Joint Report of Committee on Professional Responsibility and Subcommittee on Attorney-Client Sexual Misconduct* (1991) ..... App. 62

F- Illinois Supreme Court Rule 767(f) (Relevant Sections re: Factors to be Considered-Reinstatement to Practice of Law) (1996) ..... App. 112

G- Illinois Code of Professional Responsibility (Relevant Rules) (1980) ..... App. 113

H- Illinois Perjury Statute (Relevant Sections) (1991) ..... App. 116

I- Preamble to Illinois Rules of Professional Conduct, adopted February 8, 1990, effective August 1, 1990 ..... App. 117

APPENDIX A

[Logo]

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING

SPRINGFIELD 62701

March 31, 1997

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035
TELECOMMUNICATIONS
DEVICE
FOR THE DEAF
(217) 524-8138

FIRST DISTRICT OFFICE
20TH FLOOR
180 NO. LASALLE ST.
CHICAGO 60601
(312) 793-1332
TELECOMMUNICATIONS
DEVICE
FOR THE DEAF
(312) 793-1333

March 31, 1997

Mr. Michael W. Coffield
Coffield, Ungaretti, & Harris
Three First Natl. Plaza, S#3500
Chicago, IL 60602

No. 81878 – In re: Richard Anthony Rinella. Disciplinary Commission.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 10, 1997.

Bilandic and McMorrow, JJ., took no part.

APPENDIX B

(Filed Feb. 20, 1997)

Docket No. 81878 – Agenda 10 – November 1996.

In re RICHARD ANTHONY RINELLA, Attorney, Respondent.

CHIEF JUSTICE HEIPLE delivered the opinion of the court:

The Administrator of the Attorney Registration and Disciplinary Commission filed a complaint with the Hearing Board charging respondent, Richard Anthony Rinella, with four counts of professional misconduct for engaging in sexual relations with clients and testifying falsely before the Commission. The Hearing Board found that respondent had committed the misconduct charged in each of the counts and recommended that respondent be suspended from the practice of law for a period of three years and until further order of this court. The Review Board approved the findings and recommendation of the Hearing Board, except that it recommended that respondent's suspension expire automatically at the end of three years. We granted respondent's petition for leave to file exceptions. For the reasons that follow, we approve in part and reject in part the recommendation of the Review Board, and approve the recommendation of the Hearing Board. Respondent is suspended from the practice of law for three years and until further order of this court.

FACTUAL AND PROCEDURAL HISTORY

I. The Complaint and Answer

Count I of the Administrator's complaint alleged that in July of 1983 Jane Doe[1] retained respondent to represent her in a dissolution of marriage proceeding and paid respondent a fee of $7,500. The complaint alleged that respondent and Doe had a sexual relationship that began in approximately July of 1983 and continued throughout the duration of respondent's representation of her. The complaint alleged that the relationship was initiated by respondent when he made sexual advances to Doe during her second visit to his office, and that Doe submitted to respondent's advances because she was afraid that refusing to do so would adversely affect respondent's representation of her and because she could not afford to hire another lawyer after paying respondent his retainer. The complaint charged that by engaging in the conduct alleged in count I, respondent had committed overreaching and violated Rules 1-102(a)(5), 5-101(a), 5-102(a), and 5-107(a) of the Code of Professional Responsibility (87 Ill.2d Rs. 1-102(a)(5), 5-101(a), 5-102(a), 5-107(a)) and Supreme Court Rule 771 (94 Ill.2d R. 771).

Count II of the complaint alleged that in March of 1991 and March of 1993, while testifying under oath before the Commission, respondent falsely stated that he had never had sexual relations with Jane Doe, that he had not had sex with her at her house, and that he had never had nude photographs taken of himself at her house.

---

[1] This court has granted Jane Doe's motion to conceal her identity in this proceeding.

Count II further alleged that in June of 1993, while again testifying before the Commission, respondent retracted these denials after he was shown a nude picture of himself which he admitted was taken at Doe's house. Count II charged that respondent's March 1991 and March 1993 testimony violated Rules 8.1(a)(1), 8.4(a)(3), 8.4(a)(4), and 8.4(a)(5) of the Rules of Professional Conduct (134 Ill.2d Rs. 8.1(a) (1), 8.4(a)(3), (a)(4), (a)(5)) and Supreme Court Rule 771 (134 Ill.2d R. 771).

Count III of the complaint alleged that in November of 1983, Jeanne Metzger retained respondent to represent her in a dissolution of marriage proceeding and paid him a retainer of $2,500. The complaint alleged that on Saturday, December 10, 1983, respondent scheduled an appointment with Metzger at his office to discuss her case, and that after Metzger arrived and entered his office, respondent barred the door with a chair and initiated sexual activity with her. The complaint alleged that Metzger submitted to respondent's sexual advances because she believed that the quality of respondent's representation of her would be adversely affected if she refused. The complaint further alleged that respondent engaged in sexual activity with Metzger on two other occasions thereafter, including once on January 11, 1984, at which time respondent asked Metzger to supply him with nude pictures of her. The complaint also alleged that during a court appearance on February 8, 1984, to which respondent had asked Metzger to bring an instant camera, respondent instructed Metzger to answer all of his questions relating to her divorce in the affirmative, regardless of how she wished to respond. The complaint charged that by engaging in the conduct alleged in count

III, respondent committed overreaching and violated Rules 1-102(a)(5), 5-101(a), 5-102(a), 5-107(a), and 7-101(a)(3) of the Code of Professional Responsibility (87 Ill.2d Rs. 1-102(a)(5), 5-101(a), 5-102(a), 5-107(a), 7-101(a)(3)) and Supreme Court Rule 771 (94 Ill.2d R. 771).

Count IV alleged that Sandra Demos retained respondent's law firm in 1980 to represent her in a dissolution of marriage proceeding. The complaint alleged that although respondent did not have primary responsibility for Demos' case, he would call her frequently to ask her to meet him socially, and during these telephone calls would discuss with her items of a personal nature that he could only have learned from reviewing her file. The complaint alleged that on one occasion around 1982, respondent made sexual advances to Demos and engaged in sexual relations with her in his automobile, after which he immediately took her to a motel room where he attempted to have sexual intercourse with her. The complaint further alleged that Demos submitted to respondent's sexual advances because she believed that refusing to do so would adversely affect his firm's representation of her. The complaint charged that by engaging in the conduct alleged in count IV, respondent committed overreaching and violated Rules 4-101(b)(3), 5-101(a), and 5-102(a) of the Code of Professional Responsibility (87 Ill.2d Rs. 4-101(b)(3), 5-101(a), 5-102(a)) and Supreme Court Rule 771 (87 Ill.2d R. 771).

In his answer to the complaint, respondent denied the specific instances of sexual encounters with Doe and denied having engaged in any sexual relations with Metzger or Demos. As to the allegations of perjury,

respondent admitted that his testimony before the Commission was untrue, but maintained that his answers were justified because any sexual activity with Doe occurred after his representation of her had ceased and was therefore not a proper subject of the Commission's inquiry. Respondent also filed a motion to dismiss the complaint based primarily on the ground that no disciplinary rule specifically forbids sexual relations between an attorney and his client. The Commission denied this motion and set the matter for hearing.

II. The Evidence

Before the Hearing Board, Jane Doe testified that during her second visit to respondent's office in July 1983, respondent came over to the sofa she was sitting on and began fondling her. She testified that she began crying and that respondent told her to stop crying. She testified that she then performed fellatio on respondent. She also testified that during the sexual activity, respondent said "it would make it easier." She testified that she did not want to engage in sexual activity with respondent but felt she had to because she had just changed lawyers and paid respondent a large retainer.

Doe further testified that one day in the spring of 1984, she and respondent were undressed and engaging in fellatio in her bedroom at her house when her ex-husband, John Doe, walked into the room. Jane Doe testified that she put on a robe and followed John Doe downstairs while respondent hid in a closet. She testified that John Doe then asked where the couple's five-year-old son was, and she responded that he was at a friend's

house. She testified that John Doe periodically refers to this incident when she requests timely maintenance or child support payments from him.

John Doe testified before the Hearing Board that the incident in the bedroom at his wife's house occurred a few weeks before the entry of a supplemental judgment resolved issues of property distribution, maintenance, and child support in the Does' dissolution of marriage proceeding.

Also before the Hearing Board, Jane Doe identified two exhibits as photographs of respondent in the nude taken at her house in the spring of 1984. She said the photographs showed wallpaper in her house which she had removed in the fall of 1984.

Jane Doe admitted that she attended a holiday luncheon sponsored by respondent's law firm in 1987 or 1988, and that she sent respondent a humorous postcard in January 1986 which she signed "Lustfully Yours."

Respondent testified before the Hearing Board that while he had engaged in sexual activity with Jane Doe, this activity took place in late 1986, or in 1987 or 1988, after he had stopped representing her. He denied having sex with Jane Doe in his office in July 1983, and denied having sex with her in her house at any time. He testified that he went to Jane Doe's house on a few occasions during his representation of her, and that John Doe came to the house on one of those occasions, but said that he and Jane Doe were standing in an upstairs hallway fully clothed when John Doe encountered them. Respondent also testified that the photographs of him in the nude were taken on an occasion when he and Jane Doe

engaged in sexual activity in late 1986, or in 1987 or 1988. Respondent admitted that in prior testimony before the Commission he falsely denied ever having had sex with Jane Doe and having had nude pictures taken, but he stated that he believed these answers were justified because his sexual relationship with Doe occurred after he stopped representing her.

Jeanne Metzger testified that she retained respondent in November 1983, and that on a Saturday in December 1983, she had an appointment at respondent's office to discuss her case. She testified that when she entered respondent's office, respondent closed the door behind her and propped a chair up against the doorknob. She testified that respondent then came towards her, unzipped his pants, and sat down on the couch beside her. She testified that respondent then put his hand on her head, had her lean towards him, and pushed her head down while stating "You don't have to do this if you don't want to." Metzger testified that she then performed fellatio on respondent. She testified that while she did not want to do so, she felt she had to for the welfare of her children, whose custody was contested.

Metzger further testified that respondent scheduled another appointment with her for December 14, 1983, at his office, and that when she arrived, respondent told her to go downstairs and wait on the sidewalk outside the building. She testified that respondent then joined her outside and took her by taxi to an apartment in a high-rise building. She testified that after entering the apartment, respondent undressed and sniffed a bottle of liquid, and then asked her to do the same. She testified that she sniffed the bottle and got an "extreme high," and that

the two then had sex. Metzger further testified that on January 11, 1984, after a deposition in her case, respondent again took her to the apartment and asked her to sniff the bottle of liquid, and that the two then had sex again. She testified that on this occasion, respondent told her to make an appointment to get a "tummy tuck," and that he gave her the name of the doctor with whom she should make the appointment. She also testified that on this occasion, respondent said that he wanted to take pictures of her "from the neck down" and offered to let her take similar pictures of him, but that there was no camera in the apartment.

Metzger further testified that respondent told her to bring an instant camera to a court appearance in her case one day in February 1984. She testified that just before the court appearance, respondent instructed her to answer "yes" to all of his questions. She also testified that respondent asked her before the hearing if she had brought the camera, and that she said "yes" because she was afraid telling him the truth would affect his representation that day. She testified that immediately after the court appearance, when she told respondent that she did not really have the camera, he became angry and left abruptly, refusing to discuss with her a number of questions she had regarding the testimony she had given that day. Metzger testified that shortly thereafter, she hired another attorney to replace respondent.

Respondent testified that he never had sexual relations with Metzger. He denied propping a chair up against the door during an appointment with Metzger. He denied ever going with her to an apartment and

having sex. He also denied asking her to bring a camera to a court appearance.

Sandra Demos testified before the Hearing Board that she retained respondent's law firm in 1980 to represent her in a dissolution of marriage proceeding, and that respondent's father was the primary attorney on her case. Demos testified that she met respondent for the first time in the lobby of the law firm, and that after this meeting, he began calling her frequently to ask her out for a drink. She stated that although she continually refused to meet him, the phone calls went on for months, and that during the conversations, respondent discussed information he could only have learned by viewing her confidential files, such as her sexual history with her husband.

Demos testified that she finally agreed to meet respondent one day in March 1992. She testified that they met and had several drinks, and that respondent afterwards offered to drive her home. She testified that respondent then drove her to a harbor, parked the car, and began kissing and fondling her. She testified that she did not want to have sexual relations with him, but submitted to his advances because she feared her case would be mishandled if she did not. She further testified that after approximately 15 minutes, respondent, without saying anything to her, drove the car to a motel and took her into a room. She testified that respondent attempted to have sexual intercourse with her, but had trouble maintaining an erection, and that he then began sniffing some liquid in a bottle. She testified that respondent then attempted to force her to perform fellatio on him, but that she refused. She testified that after they had spent

approximately one hour in the motel, respondent drove her home.

Respondent testified that he did not recall ever meeting Demos, although he might have met her once briefly in the lobby of his law firm. He denied ever discussing Demos' case with other attorneys at his firm or viewing the firm's files on her case. He also denied that he ever had sexual relations with her or took her to a motel.

III. Findings and Recommendations

The Hearing Board found that respondent engaged in sexual relations with each of the three women while he or his firm represented them. The Board found that this conduct by respondent constituted overreaching because he used his position of influence over the clients to pressure them to engage in sexual relations. The Board noted that all of the women testified that they did not want to engage in sexual relations with respondent but felt that they had to in order to ensure that they were effectively represented and because they could not afford to hire another lawyer.

The Hearing Board also found that respondent violated the following rules of the Code of Professional Responsibility: Rule 1-102(a)(5), by engaging in conduct prejudicial to the administration of justice (87 Ill.2d R. 1-102(a)(5)); Rule 4-101(b)(3), by using client confidences for his own advantage in his dealings with Sandra Demos (87 Ill.2d R. 4-101(b)(3)); Rule 5-101(a), by failing to withdraw from the women's cases when his professional judgment may have been affected by his own personal

interest (87 Ill.2d R. 5-101(a)); and Rule 5-107(a), by failing to represent his clients with undivided fidelity (87 Ill.2d R. 5-107(a)). As to count II, the Board found that respondent violated Rules 8.1(a)(1), 8.4(a)(3), 8.4(a)(4), and 8.4(a)(5) of the Rules of Professional Conduct by giving false testimony before the Commission. 134 Ill.2d Rs. 8.1(a)(1), 8.4(a)(3), (a)(4), (a)(5). Finally, the Board found that respondent violated Supreme Court Rule 771 by engaging in conduct which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute. 134 Ill.2d R. 771.

The Board found that the Administrator did not prove that respondent violated Rule 5-102(a) by failing to withdraw from employment when it was obvious that he might be called as a witness other than on behalf of his clients, or Rule 7-101(a)(3) by intentionally prejudicing or damaging his clients during his representation of them. 87 Ill.2d Rs. 5-102(a), 7-101(a)(3).

The Hearing Board recommended that respondent be suspended from the practice of law for a period of three years and until further order of this court. The Review Board approved each of the findings and the recommendation of the Hearing Board, except that it recommended that respondent's suspension expire automatically at the end of three years.

ANALYSIS

I. Respondent's Sexual Relations with Clients

Respondent takes exception to the Hearing Board's finding that he committed sanctionable misconduct. He

contends that he cannot be sanctioned for engaging in sexual relations with his clients because no disciplinary rule specifically proscribes such conduct, and that imposing a sanction under these circumstances would violate due process because he did not have adequate notice that his conduct was prohibited. He also asserts that his conduct did not violate the specific rules cited by the Board and did not constitute overreaching.

Initially, we reject respondent's contention that attorney misconduct is sanctionable only when it is specifically proscribed by a disciplinary rule. On the contrary, the standards of professional conduct enunciated by this court are not a manual designed to instruct attorneys what to do in every conceivable situation. *In re Gerard*, 132 Ill.2d 507, 538 (1989). As stated in the preamble to the Illinois Rules of Professional Conduct:

> "Violation of these rules is grounds for discipline. No set of prohibitions, however, can adequately articulate the positive values or goals sought to be advanced by those prohibitions. This preamble therefore seeks to articulate those values * * * . Lawyers seeking to conform their conduct to the requirements of these rules should look to the values described in this preamble for guidance in interpreting the difficult issues which may arise under the rules." 134 Ill.2d Illinois Rules of Professional Conduct, Preamble, at 470.

The preamble then likens the practice of law to a public trust, and charges lawyers with maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients. 134 Ill.2d Illinois Rules of Professional Conduct, Preamble, at 470.

In support of his contention that only specifically proscribed conduct is sanctionable, respondent relies on *In re Corboy*, 124 Ill.2d 29 (1988). In that case, this court refused to impose sanctions on certain attorneys who made gifts to a judge because the attorneys could not reasonably have been on notice that their conduct was prohibited and because there was considerable belief among members of the bar that the attorneys had acted properly. *In re Corboy*, 124 Ill.2d at 45. In contrast, we do not believe that respondent, or any other member of the bar, could reasonably have considered the conduct involved here to be acceptable behavior under the rules governing the legal profession.

The Hearing Board found that respondent failed to withdraw from representation when the exercise of his professional judgment on behalf of his clients reasonably could have been affected by his own personal interests, thereby violating Rule 5-101(a) of the Code of Professional Responsibility. 87 Ill.2d R. 5-101(a). The Hearing Board also found that respondent failed to represent his client with undivided fidelity, thereby violating Rule 5-107(a). 87 Ill.2d R. 5-107(a). We believe the record amply supports these findings. The Hearing Board was justified in concluding that respondent took advantage of his superior position as the women's legal representative to gain sexual favors from them during times when they were most dependent upon him. Each of the women testified that she did not want to engage in sexual relations with respondent, but felt she needed to submit to his advances in order to ensure the vigorous representation of her interests. By placing his clients in such situations of duress, respondent compromised the exercise of

his professional judgment on their behalf and failed to represent them with undivided fidelity. Furthermore, with regard to Sandra Demos, the record supports the Hearing Board's finding that respondent used a confidence or secret of a client for his own advantage in violation of Rule 4-101(b)(3). 87 Ill.2d R. 4-101(b)(3).

We also believe the record supports the Hearing Board's finding that respondent engaged in conduct prejudicial to the administration of justice, thereby violating Rule 1-102(a)(5). 87 Ill.2d R. 1-102(a)(5). Two of the women described incidents in which respondent, during appointments he had scheduled with them in his office to discuss their cases, made completely unsolicited sexual advances which included undressing himself. Respondent's sexual relations with all three clients originated solely from the provision of legal services, since he did not know the women prior to their retaining him or his firm. These abuses of respondent's professional relationship with clients were clearly prejudicial to the administration of justice.

Respondent's conduct is also sanctionable as overreaching. An attorney commits overreaching when he takes undue advantage of the position of influence he holds vis-a-vis a client. *In re Stillo*, 68 Ill.2d 49, 53 (1977). By making lewd and unsolicited sexual advances to his clients during appointments purportedly scheduled to discuss their cases, and by causing the clients to believe that their interests would be harmed if they refused his advances, respondent took undue advantage of his position and thereby committed overreaching.

We further believe the Hearing Board was justified in finding that respondent's misconduct violated Supreme Court Rule 771 by tending to defeat the administration of justice or to bring the courts or the legal profession into disrepute. 94 Ill.2d R. 771.

Respondent contends that his alleged sexual misconduct should not be subject to sanction because there is no evidence that it adversely affected his or his firm's representation of the women. In this regard, we note that Jeanne Metzger testified that respondent refused to consult with her after a court appearance because he was angry that she had not brought a camera with her to take nude pictures. Even absent such evidence of actual harm, however, respondent's sexual conduct would still be sanctionable because it posed a significant risk of damaging the clients' interests. See *In re Lewis*, 118 Ill.2d 357, 362-63 (1987).

Respondent also challenges the sufficiency of the evidence that he engaged in the sexual activity alleged in the complaint. Factual findings of the Hearing Board are entitled to great deference, given the Board's superior capabilities as a trier of fact, and will not be disturbed unless they are against the manifest weight of the evidence. *In re Timpone*, 157 Ill.2d 178, 196 (1993). Considering all of the testimony in this case, we cannot say that the Hearing Board's findings are manifestly erroneous.

For the above reasons, we approve the Hearing Board's findings of fact and conclusions of law regarding respondent's sexual misconduct with the former clients.

II. Respondent's Prior Testimony Before the Commission

Respondent contends that his admittedly false testimony before the Commission is not sanctionable because the questions posed to him were ambiguous, because information concerning his private sexual relations was protected by the right of privacy, and because he later recanted his false testimony. We find no merit in any of these contentions. Respondent was clearly asked if he had ever had sexual relations with Jane Doe, to which he falsely responded " no." Furthermore, to the extent that respondent's sexual conduct constituted an abuse of his professional position, that conduct took on a public concern. Finally, we observe that respondent did not voluntarily recant his false testimony, but rather recanted only when confronted with undeniable pictorial evidence that he had lied to the Commission. Under these circumstances, his false testimony is entirely inexcusable. We therefore approve the Hearing Board's findings that respondent violated Rules 8.1(a)(1), 8.4(a)(3), 8.4(a)(4), and 8.4(a)(5) of the Rules of Professional Conduct and Supreme Court Rule 771. 134 Ill.2d Rs. 8.1(a)(1), 8.4(a)(3), (a)(4), (a)(5), 771.

III. Propriety of Recommended Sanction

Respondent contends that the three-year suspension recommended by the Hearing and Review Boards is an excessive sanction for the instant misconduct. In deciding on an appropriate sentence, the Hearing Board considered the following factors in aggravation: respondent's

pattern of misconduct, his selfish motive, the nonconsensual nature of his sexual relations with the women, his inability to appreciate the wrongfulness of his conduct, and his false testimony before the Commission. In mitigation, the Board considered that this is respondent's first charged instance of misconduct, as well as the testimony of numerous witnesses regarding respondent's good character and reputation in the legal community.

We do not believe that the recommended three-year suspension is an excessive sanction. Respondent violated numerous ethical standards in his dealings with three separate clients. He then compounded this misconduct by concealing and denying it while it was under investigation. Moreover, we believe that the seriousness of the violations in this case warrants imposition of the suspension until further order of this court, as recommended by the Hearing Board.

Accordingly, we approve in part and reject in part the recommendation of the Review Board, and approve the recommendation of the Hearing Board. Respondent is suspended from the practice of law for three years and until further order of this court.

Respondent suspended.

BILANDIC and McMORROW, JJ., took no part in the consideration or decision of this case.

JUSTICE FREEMAN, concurring in part and dissenting in part:

The majority finds that respondent has, by his conduct, violated several rules under our Code of Professional Responsibility. Therefore, the majority has

suspended respondent from the practice of law for a period of three years and until further order of the court. I agree that respondent's conduct warrants sanction, and given the nature and seriousness of that conduct, suspension from the practice of law is appropriate. However, because I fail to see how either the public is further protected or the integrity of the legal profession is further safeguarded by the "until further order" portion of the sanction, I disagree to that extent.

That said, I find it apt to comment on an additional aspect of this case. The respondent has urged that because the Code offers no explicit guidance on the issue of sexual relationships between an attorney and client, his conduct should not subject him to discipline. I agree with the majority that the absence of an explicit rule concerning sexual relationships in the context of the attorney-client relationship is not a reason to excuse respondent's conduct. No rule need have existed to inform respondent that his conduct, which was so obviously improper, was violative of the rules of professional conduct.

Respondent's misconduct consisted of more than a single isolated incident involving one client. Furthermore, this was conduct which went beyond the mere verbalization of sexual desire. At various times during the course of respondent's or his firm's representation, the respondent repeatedly engaged in uninvited physical sexual conduct with three different clients. In each of the three cases, respondent's sexual advances were both unsolicited and unwelcome. Further, some of these sexual episodes lasted no longer than did the period of the legal

representation. These facts not only evidence the gratuitous nature of the conduct, but also support the complainants' characterization of respondent's advances as coercive.

Therefore, had the circumstances of this case been different, the absence of an express rule might be reason either to excuse the conduct or certainly to impose a lesser sanction. However, this conduct far exceeds any innocent mistake in professional judgment which, in the absence of an express proscription, would merit such leniency.

As a practical matter, there could never be a set of rules which contemplates every aspect of the many encounters between an attorney and client. Furthermore, and as the majority so aptly points out, implicit in the Code is that every attorney, in the exercise of professional judgment, will conduct him or herself in a manner which will not potentially compromise the attorney-client relationship. Given that, some may disagree that there need be any rule which expressly governs sexual relations between an attorney and client. Yet, few could disagree that a *per se* rule prohibiting sexual relations between an attorney and client during the course of the legal representation would provide the clearest guidance to practitioners in this regard. Incidentally, our rules committee is on the threshold of fashioning a rule to address this very issue.

Returning to the "until further order" portion of the sanction, I again note my disagreement. Typically, the "until further order" sanction has been reserved for those cases where the attorney has been the subject of repeated

disciplinary proceedings (see, *e.g., In re Levin*, 101 Ill.2d 535 (1984) (respondent involved in repeated incidents of misconduct and prior discipline)) or where a condition which renders an attorney not fit to practice is amenable to treatment and change (see, *e.g., In re Guilford*, 115 Ill.2d 495 (1987) (until further order sanctions have been ordered in cases in which attorneys suffered mental illness or some form of addiction)). In such cases the disciplined attorney is afforded an opportunity to establish that the conduct or the condition which required suspension has actually improved or changed. Correspondingly, the court has an opportunity to assess the attorney's rehabilitation and readiness to return to the practice of law.

Respondent's conduct, which was largely confined to sexual relations with clients during the course of his or his firm's representation of them, is not conduct which is amenable to assessment of change. There are no allegations of sexual misconduct occurring outside of the attorney-client relationship. Therefore, for purposes of reinstatement, it is not apparent how respondent will demonstrate, in any meaningful way, and how this court will be able to assess, with much reliability, whether respondent has truly mended his ways. Further, respondent has not been subject to either prior or repeated disciplinary proceedings which would, for those reasons, warrant tightening the reins on his ability to re-enter the practice.

Finally I have become aware that, in practice, when an "until further order" sanction has been imposed, the process for reinstatement, which is conducted through our Attorney Registration and Disciplinary Commission,

may take well up to two years. In such cases, the "until further order" sanction operates to enhance the sanction by extending the suspension period. Absent the necessary showing that a suspended attorney's suspension should continue, any extension of that suspension, even an unintentional one, is simply unfair to the practitioner.

As a means of assessing fitness to practice law, the "until further order" sanction is invaluable. However, to the extent that the sanctionable conduct at issue is not amenable to measurement for improvement, imposition of an "until further order" sanction serves no valid purpose. This sanction should be reserved only for those cases where it will function most effectively as an assessment tool. This court, as overseers of the practice of law in Illinois, must take care to insure that the very sanction by which we assess the need for continued suspension from the practice of law does not, merely by its imposition, effect a baseless continuation of the suspension.

My disagreement with the "until further order" sanction in this case has more to do with the general operation of the sanction itself than with the fact that it was imposed on this particular respondent. Clearly, respondent's misconduct was sanctionable. However, because of the nature of this respondent's misconduct, the "until further order" sanction will be ineffective to assess, with much reliability, his fitness to return to the practice of law.

Therefore, I respectfully dissent from this portion of the court's judgment.

APPENDIX C

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

In the matter of:	)	
RICHARD ANTHONY RINELLA,	)	Commission No. 93 CH 387
Respondent-Appellant, No. 02341158	)	(Filed Apr. 10, 1996)

REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

This matter comes before the Review Board on the exceptions of Richard A. Rinella to the Report and Recommendation of the Hearing Board. The Hearing Board found that Rinella violated certain rules of the legal profession by engaging in sexual relations with his clients and recommended a suspension of three years until further order of court.

FACTUAL AND PROCEDURAL BACKGROUND

The Administrator filed a four-count complaint against Rinella. The first count of the second amended complaint alleged that Jane Doe retained Rinella to represent her in divorce proceedings. During Doe's second visit to his office in July, 1983 Rinella initiated a sexual relationship with Doe. Doe submitted to Rinella because she was afraid if she did not, Rinella would not continue to represent her. A judgment of dissolution was entered in Doe's divorce proceedings on October 19, 1983.

Count I further alleged that in May, 1984, after a hearing in Doe's dissolution proceeding, Rinella went to Doe's home and engaged in sexual activity with her. Doe's ex-husband walked in and observed his ex-wife and Rinella engaged in sexual activity. supplemental judgment for dissolution was entered in Doe's divorce proceedings on June 26, 1984.

As a result of the foregoing conduct, Count I charged Rinella with:

> –overreaching;
>
> –conduct prejudicial to the administration of justice in violation of Rule 1-102(a)(5);
>
> –failure to withdraw from employment when his professional judgment may be affected by his own personal interest in violation of Rule 5-101(a);
>
> –failure to withdraw from employment when it is obvious that he might be called as a witness other than on behalf of his client in violation of 5-102(a);
>
> –failure to represent a client with undivided fidelity in violation of 5-107(a); and
>
> –conduct which tends to defeat the administration of justice or bring the courts or legal profession into disrepute in violation of Supreme Court Rule 771.

Count II alleged that Rinella appeared at the Attorney Registration and Disciplinary Commission (ARDC) on March 12, 1991 and denied ever having sex with Jane Doe. On March 3, 1993 he appeared a second time and denied ever having sex with Doe, ever being undressed

in her bedroom or ever having a nude photo taken of him by Doe. On March 22, 1993, Rinella appeared at the offices of the ARDC and was shown nude photos of himself. Thereafter, on June 16, 1993 Rinella appeared before an inquiry panel of the ARDC and admitted having sex with Doe in her house and admitted that nude photos were taken of him. By the conduct set forth in Count II, Rinella was alleged to have

> –made a false statement of material fact known by the lawyer to be false in connection with a disciplinary hearing in violation of Rule 8.1(a)(1);
>
> –engaged in conduct involving fraud, deceit, dishonesty and misrepresentation in violation of Rule 8.4(a)(4);
>
> –committed a criminal act which reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in violation of 8.4(a)(3) by Committing perjury in violation of Ill. Rev. Stat. Ch. 38, Sec. 32-2;
>
> –engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(a)(5) and
>
> –engaged in conduct which defeats the administration of justice or brings the profession into disrepute in violation of Supreme Court Rule 771.

Count III alleged that Rinella initiated a sexual encounter with his client Jeanne Metzger in his office in December, 1983 and thereafter engaged in sexual intercourse with her on two other occasions. Metzger submitted to Rinella's advances because she believed any

rejection of those advances would impact negatively upon the quality of representation Rinella would provide.

The allegations of Count III further stated that in February, 1984, Rinella told Metzger that a pre-trial was scheduled in her case when, in reality, the matter was set for a prove-up. Prior to giving her testimony, Metzger was instructed by Rinella to answer his questions "yes" even though she had not approved a marital settlement. Thereafter, Metzger discharged Rinella and hired another attorney who concluded the dissolution matter. The misconduct charged in Count III is the same as that in Count I with the additional allegation of causing prejudice or damage to a client during the course of a professional relationship in violation of Rule 7-101(a)(3).

Count IV of the complaint alleged that Sandra Demos retained the firm of Rinella & Rinella in 1980 to handle her divorce proceedings. Richard Rinella called Demos several times and asked her to meet him for a drink. Although he did not have primary responsibility for her file, he made reference to information of a confidential nature which he could only have obtained from reviewing Demos's file or discussing her case with other attorneys in his firm. In 1982, Demos agreed to meet Rinella for a drink. Rinella made sexual advances to Demos in a parked car and then took her to a hotel where she submitted to attempted sexual intercourse. Demos submitted to Rinella's advances because she believed a refusal would impact negatively upon the quality of the representation that the firm would provide. The foregoing conduct was alleged to constitute

–failure to have the firm withdraw from employment when Rinella could be called as an adverse witness to the firm's client in violation of Rule 5-102(a);

–continuing employment when the exercise of his independent professional judgment will be or is likely to be adversely affected in violation of Rule 5-101(a);

–overreaching;

–using confidential information in a manner contrary to the best interests of his client in violation of Rule 4-101(b)(3); and

–conduct which tends to bring the Courts or legal profession into disrepute in violation of Supreme Court Rule 771.

In his answer, Rinella denied the specific instances of sexual encounters with Doe and denied having any sexual relationship with Metzger or Demos. As to the allegations of false testimony, Rinella stated affirmatively that his representation of Doe ended in April 1984 and his relationship thereafter was of no concern to the Commission. As to all counts, Rinella denied engaging in any professional misconduct.

Prior to hearing in this matter, Rinella filed a motion to dismiss the complaint arguing, primarily, that since the Illinois disciplinary rules do not prohibit consensual sexual contact between an attorney and a client, the complaint allegations do not charge a wrong subject to discipline. The Hearing Board denied the motion to dismiss.

After hearing testimony in this matter and considering documentary evidence presented by the parties, the

Hearing Board determined that the Administrator did not prove a violation of Rule 5-102(a) (failure to withdraw from employment when the attorney may be called as a witness) or Rule 7-101(a)(3) (causing prejudice or damage to a client during the course of the professional relationship). With respect to all other charges, the Hearing Board found that the Administrator proved the misconduct by clear and convincing evidence.

The Hearing Board considered in mitigation Rinella's unblemished record of 29 years, his professional ability and his impressive character witnesses. In aggravation the Board noted Rinella's lack of remorse, his failure to appreciate his misconduct, his false testimony during the investigation stage, the non-consensual nature of his relations with Metzger and Demos, and the overall pattern of misconduct. The Hearing Board recommended a suspension of three years until further order of court.

FINDINGS AND CONCLUSIONS

Rinella has challenged the factual findings, legal conclusions and recommendation of the Hearing Board. Among the issues for our determination is whether the sexual conduct involved in this case violates existing disciplinary standards and whether Rinella had notice that such conduct would be subject to discipline. We must also determine whether Rinella committed perjury or violated other rules of conduct by giving false testimony before the Inquiry Board.

In considering any argument based on the testimony of witnesses, we bear in mind that the Hearing Board is in the best position to observe the demeanor of witnesses,

judge their credibility, and evaluate any conflicting testimony. *In re Wigoda* (1979), 77 Ill.2d 154, 395 N.E.2d 571, 32 Ill.Dec. 341. The Board's findings of fact are entitled to great weight and may not be overturned unless they are against the manifest weight of the evidence. *In re Yamaguchi* (1987), 118 Ill.2d 417, 515 N.E.2d 1235, 113 Ill.Dec. 928.

After reviewing the witness testimony and the Hearing Board's assessment of credibility, we determine that the Board's findings of credibility were not against the manifest weight of the evidence. Rinella points to a number of instances in which Doe, Metzger and Demos were impeached by prior testimony. The record does reflect, with respect to each woman, that her testimony was not without flaws. On the other hand, we give significant weight to the similarities in testimony, the fact that all three women testified even though the hearing process was very uncomfortable for them, and the intangible impressions of the Hearing Board.

Having agreed with the Hearing Board as to the credibility of the witnesses and having accepted the testimony of the three women as to their sexual encounters with Rinella, we turn now to the question of whether the Administrator proved a violation of the specific ethical rules charged in the complaint. We begin our analysis by recognizing that neither the Illinois Rules of Professional Conduct nor its predecessor, the Illinois Code of Professional Responsibility, explicitly address the issue of sexual relationships between an attorney and client. Rinella interprets the silence on this issue as meaning that the conduct involved in this case is not prohibited. The Administrator, on the other hand, argues that engaging in

sex with clients affects an attorney's professional judgment and fiduciary duties and leads to a violation of specific rules dealing with those obligations.

Although the Illinois Supreme Court has yet to address this specific issue in the context of a disciplinary proceeding, both the Administrator and Rinella argue that the view of the Illinois courts has been expressed by implication. The Administrator relies on the Court's approval of the discipline on consent in *In re Gordon* (Dec. 5, 1994), M.R. 10569. In that case the respondent agreed to a probationary period of one year for engaging in sexual contact with a client. We do not regard that disposition as guiding precedent since the Supreme Court merely put its stamp of approval on a stipulation entered into by the parties. No issues were adjudicated or argued to a hearing panel or to the Court.

The Administrator also cites to *In re Marriage of Kantar* (1991), 220 Ill.App.3d 323, 581 N.E.2d 6, 163 Ill.Dec. 55 in which the majority opinion addressed the issue of whether a petition to vacate a divorce decree was timely filed. Although the majority did not reach the question of whether an alleged sexual relationship breached the attorney's fiduciary duty, the concurring opinion considered the issue and denounced sexual relationships between attorneys and clients. Justice Greiman noted that, while the Illinois Supreme Court has not adopted a rule exclusively dealing with sexual relations between attorneys and clients, the rules relating to conflict of interest and lawyer as witness may be sufficient to regulate such conduct. Moreover, he observed that the activity or conduct which is proscribed need not be explicitly

prohibited by the canons of ethics. While Justice Greiman's viewpoints and suggested scenarios are illuminating, they do not represent the holding of the court and we must view them only as one justice's opinion on the subject.

Rinella urges us to consider *Suppressed v. Suppressed* (1st Dist. 1990), 206 Ill.App.3d 918, 565 N.E.2d 101, 151 Ill.Dec. 830, an opinion which dismissed the civil action brought against him by Jeanne Metzger. The decision, which held that Metzger's complaint did not state a cause of action for breach of fiduciary duty, contains language favorable to both the Administrator's and Rinella's position. While finding that the higher standard of care required of a fiduciary should not extend to an attorney's personal relationships with his clients, the Court clearly made its determination in the context of an action for legal malpractice. The Court acknowledged that the attorney's behavior "may have been unethical" but determined that "the question of whether it should be an actionable breach of ethics for an attorney, particularly a family law attorney, to induce a client to have sexual relations during the course of representation, was a decision better left to [the] State Bar". 565 N.E.2d at 105.

While the courts of our state have not provided us with any clearcut precedent, we do note that other jurisdictions have addressed the issue of sexual relations between attorneys and clients. While those cases are not binding on the Illinois courts (*J & K Cement Constr., Inc. v. Mantalbano Builders, Inc.* (2d Dist. 1983) 119 Ill.App.3d 663, 456 N.E.2d 889, 75 Ill.Dec. 68), in the absence of Illinois determination on a point of law, the courts of Illinois will look to other jurisdictions as persuasive

authority. *Atwood Vacuum Mach. Co. v. Continental Cas Co. of Chicago* (1969), 107 Ill.App.2d 248, 246 N.E.2d 882; *Illinois Nat. Ins. Co. v. Rose* (1968), 93 Ill.App.2d 329, 235 N.E.2d 675.

Courts which have addressed the issue of sexual encounters between attorneys and clients have found sanctionable misconduct without the benefit of a specific rule prohibiting such relations. Most often the opinions have found a violation of the following rules: engaging in conduct which adversely reflects upon an attorney's fitness to practice law;[1] accepting employment when an attorney's professional judgment may be affected by personal interests;[2] failing to withdraw if the attorney might be called as a witness;[3] revealing confidences without

---

[1] Florida Bar v. Samaha (Fla. 1990), 557 So.2d 1349; Kentucky Bar Assoc. v. Meredith (1988), 752 S.W.2d 786; Dayton Bar Assoc. v. Sams (Ohio 1989), 41 Ohio 3d 11, 535 N.E.2d 298; In re Adams (Indiana 1981), 428 N.E.2d 786; In re Wood (Indiana 1976), 358 N.E.2d 128; Office of Disciplinary Counsel v. DePietro (Ohio 1994), 71 Ohio St.3d 391, 643 N.E.2d 1145; Attorney Griev. Comm'n v. Goldsborough (Md. 1993), 330 Md. 342, 624 A.2d 503; Committee on Professional Ethics v. Hill (Iowa 1989). 436 N.W.2d 57; Committee on Professional Ethics v. Durham (Iowa 1979), 279 N.W.2d 280.

[2] Kentucky Bar Assoc. v. Meredith (1988), 752 S.W.2d 786; In re Wood (Indiana 1976), 358 N.E.2d 128; Office of Disciplinary Counsel v. DePietro (Ohio 1994), 71 Ohio St.3d 391, 643 N.E.2d 1145; In re Bowan (A.D.3 Dept. 1989), 150 A.D.2d 905, 542 N.Y.S.2d 45; Bourdon's Case (N.H. 1989), 565 A.2d 1052; Drucker's Case (N.H. 1990), 577 A.2d 1198.

[3] In re Bowan (A.D.3 Dept. 1989), 150 A.D.2d 905, 542 N.Y.S.2d 45.

consent of the client;[4] engaging in conduct prejudicial to the administration of justice;[5] and/or engaging in illegal conduct involving moral turpitude.[6]

While acknowledging the precedent set by sister jurisdictions, we also give careful consideration to Rinella's argument that in this jurisdiction he had no notice that his conduct was forbidden. Rinella offers *In re Corboy* (1988), 124 Ill.2d 29, 528 N.E.2d 694, 124 Ill.Dec. 6 as an example of attorneys who were not sanctioned for their wrongdoing because they acted without the guidance of precedent or settled opinion. In *Corboy* several attorneys were solicited to give or loan money in order to financially assist the ailing mother of a judge. The Court held that the attorneys' actions violated a specific disciplinary rule when that rule was read in conjunction with the Code of Judicial Conduct but acknowledged that "it would be unfair to apply the limitation we have today for the first time defined to respondents' conduct in 1981."

Following *Corboy*, Rinella argues that since the existing rules do not explicitly prohibit sex between attorneys and clients and the Illinois Supreme Court has not addressed the issue, he had no notice that his conduct

---

[4] Kentucky Bar Assoc. v. Meredith (1988), 752 S.W.2d 786; Bourdon's Case (N.H. 1989), 565 A.2d 1052; Drucker's Case (N.H. 1990), 577 A.2d 1198.

[5] In re Bowan (A.D.3 Dept.1989), 150 A.D.2d 905, 542 N.Y.S.2d 45; Attorney Griev. Comm'n v. Goldsborough (Md. 1993), 330 Md. 342, 624 A.2d 503.

[6] Dayton Bar Assoc. v. Sams (Ohio 1989), 41 Ohio 3d 11, 535 N.E.2d 298; In re Adams (Indiana 1981), 428 N.E.2d 786; In re Littleton (Mo. 1986), 719 S.W.2d 772; Committee on Professional Ethics v. Hill (Iowa 1989), 436 N.W.2d 57.

was sanctionable. As to existing provisions applied to sexual conduct, Rinella argues that they are vague, overbroad, and fail to give objective criteria or guidelines to show how one would comport his or her sexual actions to the rules.

Other state courts have addressed and rejected due process arguments in situations similar to the present one. In *Committee on Professional Ethics v. Durham* (Iowa 1979), 279 N.W.2d 280 the attorney, charged with engaging in sexual conduct with her client, argued that the charging provisions of the Code of Professional Conduct are unconstitutionally vague because a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited. The Iowa Supreme Court applied a vagueness standard which was adjusted to the body being regulated. In other words, because the Code was written *for* lawyers *by* lawyers and because standards for members of the bar need not and cannot meet the standard of clarity required of rules of conduct for laymen due to the training and specialized nature of the body being regulated, the Court stated that the standard for determining whether a provision of the Code of Professional Responsibility is unconstitutionally vague is whether a "reasonable attorney" would understand certain conduct to be prohibited. The Court concluded that "sexual contact with a client in a professional context is not activity which a reasonable member of the bar would suppose to be allowed" by the Iowa code. 279 N.W.2d at 284.

In *Attorney Griev. Comm'n v. Goldsborough* (Md. 1993), 330 Md. 342, 624 A.2d 503, the attorney was charged with conduct prejudicial to the administration of justice as a

result of engaging in sexual relations with a client. The attorney argued that the rule in question was unconstitutional because it did not put him on notice that it could be applied to conduct not "related to judicial proceedings." The Court rejected the argument, stating:

> DR1.102(A)(5) [has] often been applied to an attorney's conduct outside of the judicial process. . . . It strains credulity to say that, merely because this Court had never previously addressed similar circumstances, an attorney with Goldsborough's experience was not 'on notice' that the conduct alleged by Bar Counsel could violate the Rules of Professional Conduct. We overrule these exceptions.

624 A. 2d at 511.

Not all misconduct is, or could be, specifically proscribed by professional standards or rules. The Administrator refers us to *In re Gerard* (1989), 132 Ill.2d 507, 548 N.E.2d 1051, 139 Ill.Dec. 495 where the Court stated that the Code of Professional Responsibility is not a manual designed to instruct attorneys what to do in every conceivable situation. *See also In re Lamberis* (1982), 93 Ill.2d 222, 443 N.E.2d 549, 66 Ill.Dec. 623 where the Court sanctioned an attorney for plagiarism, an act not specifically prohibited by the rules of professional conduct.

We conclude that a reasonable interpretation of the existing rules puts Illinois attorneys on notice that engaging in sexual activities with a client might result in disciplinary action. The fact that particular conduct is not specifically prohibited is not an excuse for engaging in behavior which falls within the nature and intent of the rules. In the forefront of every attorney's mind should be

the recognition of his/her duty and loyalty to the client and the corresponding responsibility to avoid any action which could interfere with that duty. We reject the notion that a reasonable attorney, who consciously considers the nature of his duty to his client, could examine the current rules and come to any conclusion other than the one we reach today.

For the foregoing reasons, we reject Rinella's arguments and confirm the Hearing Board's conclusion that the existing rules apply to the conduct charged in this case. We disagree, however, with the Hearing Board's conclusion that attorneys in the area of matrimonial practice have a "heightened" fiduciary duty to their clients. In our opinion, all attorneys are equally accountable to their clients and have a duty to recognize the particular needs of their clients whether those needs are caused by youth, emotional instability or mental impairment. Since every attorney is held to the very highest standard of honesty and integrity, different standards should not exist for any particular group of attorneys.

We are mindful that various groups in Illinois have attempted to have a rule enacted which would prohibit sexual relations between attorneys and clients. We do not view the success or failure of those efforts as affecting our consideration of whether the existing rules have been violated. Nor do we make any determination or recommendation as to whether such a rule should be enacted since it is the Supreme Court's sole province to make such a decision. Our responsibility is to determine whether the existing rules and standards have been violated by the conduct which occurred in this case.

We turn now to an examination of the specific violations alleged. Concerning the charge of overreaching, this term generally applies to an attorney who takes advantage of the attorney-client relationship. *In re Imming* (1989), 131 Ill.2d 239, 545 N.E.2d 715, 137 Ill.Dec. 62. In this case, each woman testified that she submitted to Rinella's advances out of fear that her case would suffer if she did not comply with his wishes. Although Rinella contends that the charge of overreaching should be confined to attorneys who derive financial benefits from the attorney-client relationship, we fail to see the difference between exploitation by an attorney for sexual gratification and exploitation for financial gain. In both instances the attorney is furthering his personal interests without regard to the consequences to his client.

As to the rule prohibiting the use of client confidences for an attorney's own advantage (Rule 4-101(b)(3)), the Hearing Board found that Rinella manipulated Demos by using private information from her file. Demos testified that Rinella knew facts about her sex life, her occupation and her children that he could only have obtained from reviewing her file. He used this information to persuade Demos to meet him for a drink. We affirm the Hearing Board's conclusions that Rule 4-101(b)(3) was violated.

Identifying specific evidence to support the finding that Rinella failed to withdraw from several cases when his professional judgment may have been affected by his own personal interest (Rule 5-101(a)) and that he failed to represent his clients with undivided fidelity (Rule 5-107(a)) is more problematic. The Hearing Board envisioned Rinella's professional judgment being clouded by

emotional attachments but did not cite any evidence to support these conclusions. Rinella finds fault with the Hearing Board's speculation as to these charges.

With regard to Rule 5-101(a), we emphasize that the language of the rule requires an attorney to withdraw from representation if his judgment "may" be impaired. Thus, actual impairment is not required for the duty to take effect. We find that Rinella's actions in voluntarily placing himself in a position where he was serving his own personal needs as well as his clients' legal needs is enough to find a violation of the rule. Clearly his actions resulted in divided loyalties and caused potential impairment to his decision-making process.

The fact that Rinella's clients did not suffer any harm to their legal matters does not prevent a finding of ethical violations. In other areas of attorney misconduct the Court has not required a showing of actual loss to a client. Rather, the Court has taken into account the potential risk of harm caused by the attorney's actions. *See e.g. In re Lewis* (1987), 118 Ill.2d 357, 515 N.E.2d 96, 113 Ill.Dec. 287 (attorney disciplined for commingling and conversion even though no loss was suffered by clients); *In re Taylor* (1977), 66 Ill.2d 567, 363 N.E.2d 845, 6 Ill.Dec. 898 (attorney disciplined for three instances of neglect even though, as to two of the matters, the clients were not prejudiced by the neglect).

The Hearing Board found that a violation of Rule 1-102(a)(5) (conduct prejudicial to the administration of justice), and Supreme Court Rule 771 (conduct which tends to defeat the administration of justice or brings the

courts and legal profession into disrepute) was self-evident since, by engaging in sexual relations with his clients and breaching his fiduciary duties toward them, Rinella harmed the legal profession as a whole. Rules 1-102(a)(5) and 771 are both catch-all provisions which hinge on a violation of other specific sections of the Code.

We find that Rinella's actions have brought the legal profession into disrepute. The public perception of attorneys is denigrated whenever an attorney abuses the attorney-client relationship. Moreover, since we have affirmed the finding that Rinella's actions may have impaired his judgment and that he did not represent his clients with undivided fidelity, we also find that the administration of justice has been prejudiced.

For the foregoing reasons, we find that the evidence supports the Hearing Board's finding of violations as charged in Counts I, III and IV of the complaint.

We turn now to Count II of the complaint which alleged that Rinella made a false statement of material fact in connection with a disciplinary hearing. Those charges stem from Rinella's denial of any sexual relationship with Jane Doe and of any nude photos taken of himself at Doe's house.

Rinella focuses his argument on the allegation of perjury, stating that the Administrator failed to prove that his allegedly false answers were directed to clear, unambiguous questions. He further argues that his constitutional right to privacy precluded inquiry into his lawful sexual activity. Finally, Rinella argues that his eventual admission of a sexual relationship with Doe, in

the same continuous investigation, precludes a finding of perjury.

Rinella contends that he believed the commission inquiry on March 12, 1991 and March 3, 1993 related only to the period of his representation of Jane Doe. He maintains that his representation of Doe ended in 1984 and during the time of representation he had no sexual relations with Doe. Thus, as to the period of representation, he claims that he answered the examiner's questions truthfully.

The questions posed to Rinella indicate that he was asked whether he had sex "at any time" with Doe and whether nude pictures were taken of him "at any time" in Doe's home. Rinella responded to the examiner's questions as follows:

> Q. Were you ever involved in sexual relations of any type with Miss Doe?
>
> A. No.
>
> Q. At any time?
>
> A. No.
>
> Q. You have never had any type of sexual activity with Miss Doe?
>
> A. No.
>
> * * *
>
> Q. Was there ever a picture of you taken without your clothes on at Miss Doe's house?
>
> A. No, I don't know why anybody would take a picture of me without my clothes on, no.
>
> Q. Was there ever a picture of you taken nude, by Miss Doe anywhere else?

A. Never.

Q. You have never had any type of sexual relationship with Miss Doe?

A. No.

Q. You have never engaged in any type of sexual activity with Miss Doe?

A. No.

* * *

Q. At any time did you have a picture taken of yourself, without your clothes on, in Mrs. Doe's home?

A. No. N-O. Now have I ever had a picture taken of myself without any clothes on? . . . That's a different story.

Q. That's my question. That's as far as – I want you to – I want you to understand that question, and I am going to ask you once more, because I am afraid you don't understand because you are carrying it on; and I am going to be very specific here. At any time, did you have your picture taken by anyone, without your clothes on, in Mrs. Doe's home?

A. No.

Q. I would ask you again, if at any time, you had a relationship with Miss Doe of a sexual nature which would include nudity, regardless of who instigated that relationship.

A. No.

Although the examiner repeatedly defined the time frame of the inquiry as "at any time" and "ever," Rinella argues that the words "at any time" are ambiguous because they

could mean "at any time" during the period of representation.

Rinella refers us to *People v. Wills* (1978), 71 Ill.2d 138, 374 N.E.2d 188, 15 Ill.Dec. 753 which states that the burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. In that case the defendant was asked several questions relating to a limited time period. Thereafter, he was asked additional questions which did not refer to a time period but which, the Court held, could reasonably have been assumed by the defendant to relate to the same specific time period as the earlier questions. Thus the defendant's responses, although false if considered within an unlimited time period, were not found to be perjurious because the answers were true if limited to the time period referenced by the earlier questions. We note that in *Wills*, the defendant's examination occurred before a grand jury and, as a grand jury witness, he had no opportunity to clarify his answers through redirect examination conducted by his attorney. The Court observed that "it is precisely because a grand jury inquest facilitates such broad, nonadversarial inquiry that we place the burden on the prosecutor to establish without ambiguity the temporal frame of reference for his questions." 374 N.E.2d at 193. In contrast, Rinella was represented by counsel during the examination before the Inquiry Board and he or his counsel could have asked for a clarification as to time frame at any time.

Having carefully examined the record in this case, we find no support for Rinella's contention that the examiner's questions were limited to a specific time period or that the questions could be interpreted as so limited. We

conclude that the questions posed to Rinella were clear and unambiguous.

Rinella further argues that perjury is not applicable because the examiner, by asking questions pertaining to his consensual sexual relationships, invaded his right to privacy. Rinella cites several cases which discuss the constitutionally protected zone of privacy, but none of those cases deal specifically with consensual sex outside the realm of marriage.

One case which has addressed consensual sexual choices determined that the subject merits less protection than other privacy issues. In *Kukla v. Village of Antioch* (N.D.Ill. 1986), 647 F.Supp. 799 a male police sergeant and female police dispatcher were fired for cohabiting in violation of a department regulation which prohibited socializing between employees of different ranks. The plaintiffs challenged the regulation, in part, as infringing upon their constitutional right to privacy. The Court stated that

> [T]he degree of protection for consensual sexual conduct depends on what conduct is involved. The Supreme Court has never expressly held that sexual decisions rank among the fundamental rights.

647 F.Supp. at 807. The Court concluded that, in public employee discharge cases, sexual choice falls in the category of rights given intermediate scrutiny so that justification of the restrictions on more than a minimal rationality basis is expected.

We note that Rinella does not raise the privacy issue in the context of the Commission's authority to regulate

sexual conduct but rather insists that the right protects him from Commission inquiry to determine if such conduct exists. We find that, within the context of determining whether ethical violations have occurred, inquiry into Rinella's sexual conduct does not warrant constitutional protection. As the Hearing Board noted, a license to practice law in Illinois is a privilege, not a right, and attorneys are subject to reasonable inquiries concerning their professional conduct. *In re Rosenthal* (1978), 73 Ill.2d 46, 54, 382 N.E.2d 257, 261, 21 Ill.Dec. 893.

The Administrator points out that another state court has considered the right to privacy defense in the context of sexual relations between attorneys and clients. In *Committee on Professional Ethics v. Hill* (Iowa 1989), 436 N.W.2d 57 the Iowa Supreme Court rejected the respondent's argument that his sexual relationship with a client violated his constitutional right to privacy, stating that "constitutional considerations of privacy are not without limits." The Court noted that sexual intercourse between the lawyer and a client seeking a dissolution of marriage carries a great potential or prejudice both to the client and to the minor children of the marriage. The Court also stated that the client had a right to expect Hill to conduct himself in a manner consistent with the tradition of the legal profession and that lawyers must maintain high standards of ethical conduct and avoid conduct which would reflect negatively upon the integrity and honor of the profession.

Another factor weighing against acceptance of Rinella's right to privacy argument is his failure to assert his claimed privacy right at the time of inquiry. His personal belief that the Commission had no right to the

information cannot serve as a basis for a secret and unilateral decision to give false answers in response to questions by the examiner.

Rinella argues that the perjury statute makes exception for a person who recants his false testimony in "the same continuous trials." Rinella cites no cases in support of his interpretation of the statute. The Administrator, however, points to *People v. Jarrett* (4th Dist. 1994), 263 Ill.App.3d 364, 636 N.E.2d 62, 200 Ill.Dec. 871 in which the Appellate Court held that a perjury prosecution could be based on a false statement made by the defendant during a pretrial bond hearing which he later recanted at trial. For purposes of the statute the court defined "trial" as a hearing on the merits of the case and found that the pretrial bond hearing was not a hearing on the merits of the case. The Court also stated that "timeliness" is an essential element of the defense.

In the instant case, the inquiry process can not be defined as a hearing on the merits of Rinella's case. Thus Rinella's recantation, either before the Inquiry Board or at the hearing on this case, does not fall within the specific wording of the perjury statute. Moreover, Rinella's eventual recantation occurred more than two years after his initial statement denying sexual contact with Jane Doe and only after being confronted with irrefutable evidence that a sexual relationship did take place. Under these circumstances, the bar to prosecution does not apply.

We affirm the Hearing Board's finding that Rinella committed perjury and thereby violated Rule 8.4(a) (3). By the same conduct he also made a false statement of

material fact known by the lawyer to be false in connection with a disciplinary hearing in violation of Rule 8.1(a)(1); engaged in conduct involving fraud, deceit, dishonesty and misrepresentation in violation of Rule 8.4(a)(4); engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(a)(5) and engaged in conduct which defeats the administration of justice or brings the profession into disrepute in violation of Supreme Court Rule 771.

SANCTION

In determining the appropriate discipline, the Hearing Board examined the proven misconduct and considered in mitigation Rinella's unblemished record for twenty-nine years, his professional ability, and his impressive character witnesses. In aggravation the Board took into account Rinella's pattern of misconduct, his selfish motive, the lack of consent to sex by Metzger and Demos, his false testimony at the hearing, his complete lack of remorse and his inability to appreciate the wrongfulness of his actions. The Hearing Board recommended a suspension of three years and until further order of Court.

Rinella takes issue with several of the factors considered in aggravation. First, Rinella points out that the Hearing Board's finding that "sex with Metzger and Demos was never consensual" is not supported by any evidence. Although no charge was ever made that Rinella used force or threats against these particular clients, both Metzger and Demos testified that they felt they had to

submit to Rinella's advances to ensure adequate and continued representation. Rather than "nonconsent", perhaps a better term for the position in which Metzger and Demos found themselves would be "submission by reason of intimidation" or "perceived lack of choice." Whatever terminology is used, we believe that an attorney as experienced as Rinella had full appreciation for his position of power over his clients. Therefore we believe that the Hearing Board properly considered in aggravation the position of Metzger and Demos.

As to the Hearing Board's view of Rinella's false testimony at hearing as an aggravating factor, Rinella complains that the Board did not specify the testimony that was false. Rinella is correct that the Hearing Board did not point to specific statements but the Board did find Rinella's denials of sexual activity not credible. Thus the Board clearly would have viewed Rinella's testimony on the main occurrences involved in this case to be false.

Rinella makes an interesting point concerning the Hearing Board's discussion of remorse as an aggravating factor. If a Respondent chooses to maintain his innocence, then he would not be expected to show a lack of remorse for his actions. The Court, however, has mentioned both remorse and the giving of false testimony as factors in determining discipline. In *In re Smith* (1979) 75 Ill.2d 134, 387 N.E.2d 316, 25 Ill.Dec. 660, an attorney persisted in maintaining that his use of clients' funds was authorized even though each client testified to the contrary. The Court believed the clients and, in determining discipline, observed that the attorney lacked candor and was not remorseful. *See also In re Lewis* (1990), 138 Ill.2d 310, 562

N.E.2d 198, 149 Ill.Dec. 734. We do not find the Hearing Board's consideration of these factors to be erroneous.

Finally, Rinella disputes the Hearing Board's finding that he engaged in a "pattern" of misconduct. Rinella reasons that three instances out of 1,000 to 2,000 clients do not create a pattern such that it warrants consideration as an aggravating factor. The Administrator effectively rebuts this argument with citation to *In re Samuels* (1989), 126 Ill.2d 509, 535 N.E.2d 808, 129 Ill.Dec. 43 wherein the Court found a pattern of misconduct in four instances of neglect out of some 14,000 matters handled by the attorney. In the present case Rinella cannot dispute the similarities between the various occurrences and the witness testimony that in each instance Rinella initiated the sexual encounters. We believe that three occurrences with similar scenarios over a period of several years constitutes a pattern of conduct.

Having determined that significant aggravating factors exist, we must determine the appropriate discipline for the misconduct which occurred in this case. We are guided by prior Illinois decisions involving false statements made to the Commission. As to sanctions for improper sexual conduct, we look to sister states for guidance.

False statements by an attorney regarding a matter under investigation by the Administrator has warranted harsh statements by the Court and has contributed to substantial discipline. In *In re Stillo* (1977), 68 Ill.2d 49, 368 N.E.2d 897, 11 Ill.Dec. 289 the Court disbarred an attorney for defrauding a client of $10,000, lying to other clients and lying in his testimony before the Hearing

Board. The Court stated that the giving of false testimony "demonstrates a further unfitness of an attorney to practice law." 368 N.E.2d at 899. Similarly, in *In re Houdek* (1986), 113 Ill.2d 323, 497 N.E.2d 1169, 100 Ill.Dec. 807 the Court suspended an attorney for two years and until further order for commingling and converting $45 and for lying in his response to the Administrator and fabricating evidence in an attempt to avoid discipline.

Discipline for engaging in sexual relations with clients has resulted in a range of sanctions. Rinella points out that in many of the cases which have dealt with this issue the discipline imposed was less severe than that recommended in this case. Most of those cases are distinguishable, however, in that they either did not involve the added misconduct of giving false testimony to the Commission or the sexual encounters were limited to one client or to verbal solicitations. One case which involves a pattern of sexual relationships with clients is *In re Bowan*, (A.D.3 Dept 1989), 150 A.D.2d 905, 542 N.Y.S.2d 45. In *Bowan* the attorney attempted to use the attorney-client relationship in furtherance of sexual relationships in at least five separate instances. He had sexual relations with at least two clients and told one client that he might refuse to work on her case if she refused to engage in sex. The attorney was suspended for two years. In *In re Rudnick*, (1992) 177 A.D.2d 121, 581 N.Y.S.2d 206 an attorney was suspended for two years after coercing a client into having sex with him and telling the client he would abandon her case if she terminated the relationship. The attorney had been previously reprimanded for coercing another client to have sexual contact with him in his law office.

We are mindful that the purpose of disciplinary proceedings is to safeguard the public, maintain the integrity of the profession, and protect the administration of justice from reproach. *In re Ettinger* (1989), 128 Ill.2d 351, 538 N.E.2d 1152, 131 Ill.Dec. 596. The Court has stated that its goal is to impose sanctions consistent with sanctions imposed for similar misconduct so as to ensure predictability and fairness in future disciplinary cases. Each case, however, is unique and must be resolved with respect to its particular facts and circumstances. *In re Timpone* (1993), 157 Ill.2d 178, 623 N.E.2d 300, 191 Ill.Dec. 55. Based on the misconduct which occurred in this case, as well as the aggravating factors, we agree with the Hearing Board that a suspension of three years is appropriate.

The Hearing Board recommended that the suspension be until further order of court. The Board considered Rinella's false testimony at the hearing and lack of remorse as reasons for requiring Rinella to demonstrate his fitness to practice law at the end of his suspension period.

Caselaw gives some direction, although limited, as to the circumstances in which a suspension until further order is appropriate. In *In re Guilford* (1987), 115 Ill.2d 495, 505 N.E.2d 342, 106 Ill.Dec. 36, the Court noted that suspensions until further order have been ordered in cases in which attorneys suffered from mental illness or some form of addiction, restitution was an issue, there was an extraordinary disregard for the disciplinary process, or there was an unusual frequency and severity of misconduct. Also, a suspension until further order has been imposed where there was lack of any evidence that

the attorney was willing or able to meet professional standards of conduct in the future. *See In re Levin*, (1984), 101 Ill.2d 535, 463 N.E.2d 715, 79 Ill.Dec. 161 (repeated instances of misconduct as well as prior discipline); *In re Houdek* (1986), 113 Ill.2d 323, 497 N.E.2d 1169, 100 Ill.Dec. 807 (misconduct and fabrication of evidence to deceive the disciplinary commission); *In re Levinson* (1978) 71 Ill.2d 486, 376 N.E.2d 998, 17 Ill.Dec. 669 (misconduct and indifference to disciplinary proceedings). Generally these situations involve conditions which are subject to change or improvement and before being reinstated an attorney has to demonstrate that the condition has actually been changed.

We do not view Rinella's misconduct as a type which is conducive to proof of change or improvement. We understand that a reinstatement proceeding is necessary and proper when an attorney is able to take affirmative steps to improve his conduct and offer concrete evidence of his rehabilitation. In this case, however, we can think of little that could be offered other than Rinella's own assurances that he has abstained from any misconduct and will not engage in future misconduct.

We note that the misconduct at issue occurred between 1982 and 1984 and there has been no evidence of any sexual involvement with clients since that time. While the lapse of time since the misconduct occurred does not enter into our determination of whether the conduct is subject to discipline, we will consider the absence of any misconduct since 1984 in determining whether a suspension until further order is warranted.

Finally, we note that Rinella has not been the subject of any prior disciplinary proceedings. The foregoing reasons lead us to conclude that a suspension until further order of court is not necessary in this case.

RECOMMENDATION

Having reviewed the record in this case and having affirmed the findings and conclusions of the Hearing Board, we recommend that Respondent-Appellant Richard A. Rinella be suspended from the practice of law for a period of three years.

Respectfully Submitted,

Timothy R. Neubauer
James E. Caldwell

Dated: 10 April 1996

Panel Member Martin H. Katz is submitting a separate opinion

APPENDIX D

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

IN THE MATTER OF:	)	
	)	
RICHARD ANTHONY RINELLA,	)	Commission No. 93 CH 387
	)	
Attorney-Respondent.	)	
	)	
No. 02341158	)	
	)	

DISSENTING REPORT AND RECOMMENDATION

(Filed Apr. 10, 1996)

I respectfully dissent from the recommendations of my colleagues as to Counts I, III and IV. I concur with their recommendations as to Count II but dissent as to the recommended discipline. In doing so, I hope these comments will not be misunderstood since the authors of the majority report are intelligent, thoughtful, honorable people.

Perhaps some preliminary discussion is appropriate. As the majority report is being submitted, there is an ongoing debate over proposed Rule 1.17 regulating sexual relations between client and lawyer. Those recommendations range from 1) a *per se* ban on sex between lawyer and client to 2) banning sex if the lawyer reasonably should know about the client's emotional or financial dependency. The majority report acknowledges this debate and previous attempts to enact a rule dealing in

some form or another with sexual contacts during representation. Obviously, the recommendation of the majority makes all of this past and present debate unnecessary if the existing rules already cover the subject. It is not clear in reading the majority report whether sexual relations between lawyer and client are banned under all circumstances, some circumstances or just the facts of this case.

While all cases require attention to particular "facts," no matter can be decided *only* on "facts" unique to it and still provide proper guidance as to conduct. By imposing discipline under the rules cited, the result here is an implicit *per se* ban on sexual relations between lawyer and client while claiming to decide only the facts of this case.

Though not necessarily relevant to this dissent, there is a somewhat disturbing factual background here. Before these matters ever reached the disciplinary authorities, the complainants enlisted the aid of a person connected with a local law school. That person commenced civil suits on behalf of all three people asking for monetary damages against the respondent. Those suits, the history of which need not be detailed, were apparently filed in both state and federal courts seeking money damages against the respondent for having sexual relations with these clients.[1] Those suits were ultimately dismissed. Mention is made of this because it was only after the unsuccessful attempts to collect damages that these cases reached the ARDC.

---

[1] In fact, suit was filed in federal court alleging that the respondent violated provisions of the RICO statute.

One final observation: If one were to conduct a poll on the propriety of sexual relations, even if consensual, the public and/or bar might well disapprove. This observation is based on anecdotal evidence only since no plebiscite has been conducted on the propriety of this type of behavior. The point to be made is that Illinois does have and has had a reasonably detailed Code of Professional Responsibility both in the 1980 and 1990 versions. Both of those Codes of Professional Responsibility give reasonably good guidance as to acceptable lawyer conduct. These codes of conduct were passed, of course, with a history of case law on legal ethics and behavior and the majority notes that no Illinois case has touched on the issue of lawyer-client sex until quite recently and then not directly. For reasons expressed in this recommendation, the rules cited by the majority (Supreme Court Rule 771, 1-102(a), 5-101(a), 5-102(a), 5-107, 4-101(b) (3)[2] and "overreaching" are not sufficient to reach the conduct complained about. This is not to say that the respondent deserves a good conduct award for what went on here, but we deal with a code (and a reasonably detailed one) and what conduct is covered by it.

---

[2] Rule 771 refers to conduct which tends to bring the court or legal profession into disrepute. Rule 1-102(a) (5) refers to conduct prejudicial to the administration of justice, but here the lawyer and clients were not engaged in the administration of justice. As to Rule 771, the courts are not implicated here and there are many instances where lawyers' behavior may be disapproved by the public (or the bar) but that conduct would not violate Rule 771.

The basis of this dissent is that the sexual relations which occurred here were consensual acts between people well into adulthood. That is to say, there was no threat or intimidating behavior identified by the complainants emanating from the *respondent* to the clients of withholding representation absent sex nor is there anything in this record which suggests that the respondent proposed sexual relations *in lieu* of fees.

The testimony of all three clients standing by itself point to no overt act or threat from the respondent. The claimed "intimidation" felt was a subjective, personal state of mind, and none of the individuals communicated these subjective mind states to respondent.[3] All three clients testified that the respondent initiated the sexual encounters and that the clients engaged in those encounters because they either feared that representation would be compromised or felt they didn't have money to consult another lawyer.

Suppose, however, that the respondents had testified that they initiated the sexual encounter because they had an uncommunicated belief or feeling that their representation by the respondent would be enhanced or their fees might be less. Employing the specific canons relied on here would make respondent's conduct just as sanctionable. The present rules do not contemplate that Hearing

---

[3] A review of the testimony reveals a certain monotonous uniformity in the testimony of all three complainants as to their states of mind concerning events which happened a decade or more earlier. The majority finds this sameness to be compelling, but even so, it does not convert a matter of law into a question of fact.

and Review Boards be given the job of deciding whether "yes" means "no" or "maybe" (at least in this type of intimate setting).

The Hearing Board drew a distinction between matrimonial lawyers and other categories of lawyers which the majority opinion declines to accept. If consensual sex between *all* lawyers and clients is barred under existing rules, then the majority is saying (or comes very close to it) that no sex between a lawyer and a client can be consensual because one of the persons is a lawyer. If that is so, then a marriage between a lawyer and a client preceded by sexual relations during representation must be condemned as having been conceived in the bed of ethical impropriety. Suppose further, that the lawyer and client were sexually intimate before representation but the lawyer and client agree that the lawyer will represent the client on a legal matter. Would the sexual relations that continued during representation be a violation of the Rules the majority relies on? It is hard to believe that the present disciplinary rules alleged were intended to lead to that type of result. Perhaps one might argue under these hypotheticals that a waiver occurred, but, can there be a waiver if consent cannot be given during representation?[4]

If this is what is intended, then the result reached here is rather analogous to criminal statutes forbidding people to engage in sex with persons under a certain age

---

[4] If there can be a waiver by a client under these circumstances, then that may negate the applicability of the canons dealing with conflict of interest because conflicts can be waived.

because those persons lack capacity to consent as a matter of law even though they have in fact done so. Those laws, however, are to protect children and the complainants here were not children.

Of course, the Hearing Board's findings are to be accorded deference. *In re Yamaguchi*, 118 Ill.2d 417, 515 N.E.2d 1235 (1987). However, accepting the testimony of complainants at face value indicates consent by adults as a matter of law. The Hearing Board's findings are, therefore, not factual findings as much as they are value judgments flowing from facts. Value judgments or findings of law by the Hearing Board are not binding on the Review Board. *In re Imming*, 545 N.E.2d 715, 137 Ill.Dec. 62 (1989).

In short, absent some rule governing sexual relations between a lawyer and client, none of the existing rules bar the consensual sex here.

The observation is made in the majority recommendation that not all misconduct is or could be specifically described by professional standards of rules. That general statement is true but neither *In re Gerard* (1989), 132 Ill.2d 507, 548 N.E.2d 1051, 139 Ill.Dec. 495, or *In re Lamberis* (1982), 93 Ill.2d 222, 443 N.E.2d 546, 66 Ill.Dec. 623, is persuasive authority for extending the disciplinary rules cited to cover the conduct here.

In re Gerard involved discipline because of excessive fee charges, but there was and is a rule at least prohibiting "excessive" fees. Likewise, in *Lamberis*, while there was no specific rule dealing with plagiarism, there was and still is a rule banning fraudulent conduct which plagiarism is. Here the rules do not even mention sex, much less consensual behavior.

The majority opinion recognizes the absence of a rule or case law in Illinois but cites numerous opinions from other jurisdictions on the subject. Almost all those cases, however, were decided after the date of the respondent's conduct. Of the many cases cited, only *In re Adams* (Ind. 1981), *In re Wood* (Ind. 1976), *Committee on Professional Ethics v. Durham* (Iowa 1979) were authored before the conduct here. Even those cases cannot be read as a *per se* ban on sex. Cases from other jurisdictions which were decided at later dates are not authority for the argument that respondent was on notice under decisions from other jurisdictions. In addition, those cases involve other misbehavior accompanying the sexual conduct not present here.

Given that absence of precedent, *In re Corboy*, 124 Ill.2d 29, 528 N.E.2d 694 (1988), is controlling. In *Corboy*, the Supreme Court declined to enter any disciplinary sanction against attorneys even though the court found that a disciplinary rule had been violated because the attorneys had acted without the guidance of precedent or settled opinion. This fact situation is less compelling than *Corboy* because in *Corboy* there was a written rule dealing with gifts to judges. Here there is no rule mentioning sexual relations (of any kind) at all. Because there was none, under the authority of *Corboy* there was no notice to the respondent that engaging in consensual sex violated the Code of Professional Responsibility.[5]

---

[5] There is no authority cited which suggests *Corboy* has been overruled *sub silentio*.

Should there be a rule in some form or another dealing specifically with sexual relations during representation? Perhaps. But what the rule, if any, should and how it comes about (whether through written canon or case law) belongs to the Supreme Court after full airing of issues. In the absence of a rule, the present rules should not be expanded to cover this conduct simply because the Hearing Board made a factual finding that the respondent received personal gratification.[6]

Therefore, I would discharge the respondent under Counts I, III and IV.

This leaves open Count II which charged respondent with giving perjured testimony during the preliminary inquiry stages before the ARDC in violation of Ill.Rev.Stat., ch. 38, sec. 32-3, now 720 ILCS 5/32-3, and Rule 8.1(a)(1), 8.4(a) (4) and 8.4(a)(5) & (7) (1). This count does present questions of fact and I agree with the recommendation of the Review Board which affirms the factual findings of the Hearing Board that the respondent gave false testimony concerning sexual relations with "Doe."

Affirming only Count II means that discipline is appropriate even though there are no other ethical violations by the respondent. Both the administrator and the respondent acknowledged at oral argument that there are no cases in Illinois in which discipline was imposed for false testimony before the ARDC absent a finding of any

---

[6] The respondent's argument that there is a difference between overreaching for financial as opposed to sexual gratification is rejected here, but financial benefits are capable of some degree of measurement. The sexual gratification here is not.

other violation. Even if no other violations of the Code are present, giving false testimony to the ARDC is a violation of the Code of Professional Responsibility because the plain language of the rules are clear as to an attorney's duty to be truthful when giving testimony to the ARDC even if one believes the administrator is pursuing a *cause de jour.*

The majority recommends a suspension of three years. It is not clear (nor need it be) how much of that recommendation is attributable to respondent's sexual relations with clients and how much to the respondent's untruthfulness. There are no cases which shed any light on how much of the total discipline should be allocated to untruthfulness and how much to other misconduct. Arguably, untruthfulness may be the more serious matter here. Whatever the allocation should be, public policy expressed in the Code does require that attorneys be truthful regardless of the underlying merits of the inquiry. Finally, I concur that the recommendations of the Hearing Board of a suspension "until further order of court" is not appropriate for the reasons stated by the majority.

Absent any case law dealing with the question of discipline based only on giving false testimony, I recommend a suspension of the respondent from the practice of law for one year.

Respectfully submitted,

/s/ Martin H. Katz
Martin H. Katz

APPENDIX E

CHICAGO BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL RESPONSIBILITY

Committee Chair – Fr. Philip Grib S.J.
Vice-Chair – Norbert Jacker

DATE APPROVED: November 15, 1991

SUBCOMMITTEE ON ATTORNEY-CLIENT
SEXUAL MISCONDUCT

DATE APPROVED: October 18, 1991

Members: John Bacon
Muriel Kuhs
C. Harker Rhodes
Cornelia Honchar Tuite
Mary C. Ambrose-Gerak, Chairman

TABLE OF CONTENTS

Page No.

Preface 1

Subcommittee's Charge 2

Summary of Subcommittee Finding 3

Proposed Rule 5

I. Incidence of Attorney-Client Sexual Relations

A. Gender Bias Task Force 8

B. American Academy of Matrimonial Lawyers 10

C. ARDC 11

1. Oral Report 12

2. Written Materials 13

D. Northwestern Legal Clinic 14

E. Practitioner's Viewpoints 15

II. Existing Ethical Guidelines

A. Illinois Cases 16

B. Other Jurisdictions 21

1. Common Disciplinary Grounds 21

2. Lack of Clearly Articulated Standards Creates Uncertainty 23

3. An Example of Clearly Articulated Standards 28

4. Misconduct Involving Moral Turpitude or Lack of Fitness to Practice 29

5. Breach of Fiduciary Duty 31

6. California Disciplinary Rule 33

III. Subcommittee Consideration of Possible Recommendations

A. Preserve the Status Quo 35

B. Propose New Rules .....

1. Apply Rule to Entire Bar 38

2. Reject Presumptions 40

3. Reject Per Se Prohibition 43

IV. Proposed Illinois Rule of Professional Conduct 1.17

A. Text of Proposed Rule 1.17 45

B. Rationale for Proposed Rule 46

Appendices

Preface

The Professional Responsibility Committee (the "Committee") of the Chicago Bar Association at a May 1991 meeting considered a State Bar of California proposal and an Illinois legislative measure calling on the Illinois Supreme Court to consider lawyer ethical rules regulating attorney-client sexual relations.[1] The California proposal attracted national attention, prompting lawyers to debate whether such a rule was necessary or merely raised the prospect of confounding already existing rules and, therefore, unnecessary.

The Committee also considered the Illinois Gender Bias Task Force report and several Illinois Appellate decisions delving into allegations of attorney-client sexual misconduct. The Committee decided to review all this material and requested James Grogan of the Illinois Attorney Registration and Disciplinary Commission ("ARDC") to explain Illinois' regulatory posture and its attitude towards attorney-client sexual relations.[2]

---

[1] The State Bar of California's new rule, as well as its legislative history – are discussed at length in Section III.

[2] Grogan's remarks and his full report are discussed further in Section II of report. The ARDC has two cases pending which could not be discussed. John Elson, an advocate for the victim in *Suppressed v. Suppressed*, led the sub-committee to believe that one of those cases was a second attempt at the attorney in *Suppressed* for a 10-year history of this conduct with at least four other female clients.

Subcommittee's Charge

Following Mr. Grogan's remarks, the Committee created a subcommittee on Professional Relations (the "Subcommittee"), chaired by Mary C. Ambrose-Gerak, and members Cornelia Honchar Tuite, formerly Assistant Ethics Counsel at the American Bar Association's Center for Professional Responsibility and now a sole practitioner, John Bacon, in-house counsel for Sears, Roebuck and Co., Muriel Kuhs of Davis, Friedman, Zavett, Kane & MacRae, and C. Harker Rhodes, Jr. of Sonneschein Nath & Rosenthal.

The Committee directed the subcommittee to address three principal questions:

1. Should any sexual relations between lawyers and clients during the course of representation be prohibited?

2. If so, under what circumstances should sexual relations be prohibited?

3. Do existing Illinois ethical rules adequately prohibit these kinds of sexual relations?

Section I of this Report discusses the perceived incidence of improper attorney-client sexual relations and a summary of interviews the subcommittee conducted with representatives from groups which have some expertise in the area of attorney-client relations, including the ARDC, the matrimonial bar, legal clinics, and the Illinois Task Force on Gender Bias.

Section II analyzes existing case law which centers around three ethics rules currently used to discipline lawyers engaged in sexual relations with clients.

Section III contains a synopsis of the subcommittee's consideration of possible recommendations as well as the need for a new rule and various proposals.

Finally, Section IV contains the subcommittee's recommendation.

Summary of Subcommittee Findings

The products of the subcommittee's investigation are a determination that exploitative attorney-client sexual relations should be regulated and a recommendation to the Chicago Bar Association to support the adoption of a proposed rule that should be added to the Illinois Rules of Professional Conduct, promulgated by the Illinois Supreme Court. These conclusions are based on the following subcommittee determinations:

1. Sexual relationships between lawyers and clients during the course of representation are subject to certain civil, criminal, and moral standards. The subcommittee only directed its attention to mandatory prohibitions for professional conduct which would result in professional regulation and discipline.

2. Sexual relationships that are exploitative should be formally disciplinable.

3. The Illinois Rules of Professional Conduct already contain three provisions that can be interpreted together to provide a framework of rules to govern lawyers engaging in such sexual relations. None of these three rules (conflict of interest, integrity of the profession or administration of justice) explicitly

addresses sexual relations between a lawyer and client.

4. Therefore, a new rule is required:

   (a) to provide a statement by the Illinois legal profession that sexually exploitative relationships between lawyers and clients, just like financially exploitative relationships between lawyers and clients, are intolerable as a matter of ethical principle; and

   (b) to establish a burden of proof on the ARDC to protect lawyers from unfounded allegations of sexual misconduct.

Proposed Rule

Proposed Rule 1.17 Sexual Misconduct

(a) A lawyer shall not, during the representation of a client, engage in sexual relations with the client if:

(1) The sexual relations are the result of duress, intimidation, or undue influence by the lawyer; or

(2) The lawyer knows or reasonably should know that the client's ability to decide whether to engage in sexual relations is impaired by the client's emotional or financial dependency, or some other reason.

(b) Where a lawyer in a firm has sexual relations with a client, the other lawyers in the firm shall not be subject to discipline solely because of the occurrence of such sexual relations.

I.

Incidence of Attorney-Client Sexual Relations

First, the subcommittee had to determine if sexually exploitative conduct between attorneys and clients occurred with quantifiable frequency in Illinois. The subcommittee could not find a statistically reliable survey or study revealing the frequency with which lawyers engaged in exploitative relationships with their clients, if they occur at all. The subcommittee contacted the American Bar Foundation to explore its ability to conduct such surveys. Such a survey would be cost prohibitive and is not feasible at this time. The promulgation of this Rule should not preclude such a study which must include in-depth interviews with both clients and lawyers.

Late in the review process, one member of the subcommittee received an informal survey questionnaire asking lawyers if they engaged in sexual relations with clients or knew of any such conduct. The subcommittee determined the survey involved few Illinois lawyers and would not be available within a reasonable time for inclusion in the subcommittee's deliberations.[3]

The evidence is, in some instances, anecdotal; only a small number of cases involving alleged lawyer sexual misconduct have been reported. However, the ARDC reports that at least one percent of the approximately 5,000 annually filed complaints concern attorney sexual

---

[3] A law professor and psychologist from Memphis State University, Cecil Humphreys School of Law are conducting the research for a law review article.

misconduct. Furthermore, it is significant that within the last year, Illinois courts have decided three reported cases involving alleged lawyer sexual misconduct, and that two cases of alleged sexual misconduct are pending before ARDC Inquiry panels.

Moreover, the Illinois legislature recently considered a bill introduced by Senators Geo-Karis and Macdonald requesting the Supreme Court to consider a new rule regulating lawyer/client sexual conduct.[4] The bill directs the Supreme Court to adopt a new ethical rule "which at a minimum prohibits an attorney-client sexual relationship during the period of the attorney-client relationship, except where the client is the spouse of the attorney or where the sexual relationship predates the attorney-client relationship."

In July 1991, the Illinois Senate adopted Resolution 361 directing the Illinois Supreme Court to promulgate an ethical rule governing attorney-client sexual relations, and recognizing that "emotional detachment is essential to the lawyer's ability to render competent legal services, yet it is extremely difficult to separate sound judgment from the emotion or bias that may result from a sexual relationship between a lawyer and his or her client during the period that an attorney-client relationship exists."[5]

Equally significant are the decisions of the State Bars of California and Michigan (widely recognized by ethical

---

[4] A copy of the full text of the bill is attached as an Appendix to this report.

[5] Full text of SR 361 is in appendix.

experts as a bellwether of ethics law trends) to regulate lawyer sexual conduct and the spate of articles in the law-related media discussing this issue.[6]

All of these recent events strongly reveal a wide interest in attorney-client sexual relations, but, as of this writing, no one can state with certainty the exact nature or the scope of lawyer sexual misconduct. The absence of ARDC complaints, for example, may only reflect client failure to report. Reporting of all forms of abuse, such as child abuse and physical abuse in marriage, has increased in recent years, because society's values have changed, and it is now willing to listen to complaints that previously were kept secret out of fear of rejection or embarrassment.

The subcommittee looked for sources of relevant information, since hard statistical data were lacking. One of the interesting research results from the efforts of the Subcommittee members was that the victims would have to be thorough and tenacious to reach the ARDC. Random calls to the Bar Association or other organizations were not always channelled in a method helpful to the alleged victim.

A. Illinois Task Force On Gender Bias

The subcommittee turned to the Illinois Task Force on Gender Bias, a joint venture of the Illinois State Bar Association, the Chicago Bar Association and the Women's Bar Association of Illinois "established . . . to

---

[6] A copy of the information from Michigan is attached.

study and report on gender bias on the Illinois courts."[7] This report is divided into four parts, one of which focused exclusively on domestic relations, which noted that the ARDC had alerted the Task Force to the occurrence of sexual relationships between domestic relations attorneys and their clients. The Executive Summary failed to indicate whether the ARDC considered this to be a prevalent problem and did not provide any statistics.[8] The Task Force was concerned such a relationship, if occurring during the pendency of a divorce, would create a conflict with the attorney's fiduciary duty to the client. The Task Force made no recommendations about such conduct in non-divorce matters, but simply highlighted the potentially grievous problems that could arise in a divorce proceeding. The Chicago Bar Association Matrimonial Law Committee approved that recommendation of the Task Force.

The Task Force recommended a new rule in the Rules of Professional Conduct regulating sexual relationships between divorce lawyers and their clients during the pendency of the divorce. The Task Force indicated that the rule should presume these sexual relationships to be unethical and unprofessional.

---

[7] The 1990 Report of the Illinois Task Force on Gender Bias in the Courts, Executive Summary, Page 1.

[8] As we will indicate in Sec. H(1), supra, available statistics indicate that 1.0% of the approximate 5,000 complaints to the ARDC concern attorney sexual misconduct.

B. American Academy of Matrimonial Lawyers

Further information concerning the problem of attorney-client sexual relationships was presented by Errol Zavett, a Chicago attorney, and Fellow of the American Academy of Matrimonial Lawyers, who has served on a committee which has produced a publication entitled, "Bounds of Advocacy – Standards of Conduct in Matrimonial Litigation."

That publication discussed many aspects of the relationship among attorneys, among attorneys and courts, and among attorneys and their clients, and specifically considered the issue of sexual relations between a lawyer and a client. A specific rule emerging from the standards prohibits a sexual relationship with a client or opposing counsel during the time of the representation. Rule 216 provides: An attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation.

The Bounds of Advocacy standard is aspirational ("should" rules) and is intended to apply to any attorney practicing family law exclusively or in an individual case, not merely to Academy Fellows. None of the standards has any disciplinary effect; rather, they reveal the Academy's perception that a sexual relationship between an attorney and clients "may endanger both the client's welfare and the lawyer's objectivity."

Mr. Zavett did not recall any special resistance to the passage of this standard. The Academy apparently agreed with the Bounds of Advocacy committee that since persons seeking a divorce are often in a highly vulnerable

emotional state, it would be very inappropriate for a lawyer to capitalize on such vulnerability. In answer to questions, Mr. Zavett stated it was his belief that while the Academy could only address the issue of lawyer-client sexual relationship in a divorce context, any rule adopted by the Illinois Supreme Court should apply equally to all lawyers without regard to of [sic] the lawyer's area of concentration or the subject of the representation.

Prior to the formal adoption of the Bounds of Advocacy, the Academy circulated the document in draft to a variety of experts, including some legal ethics experts. In a letter that Mr. Zavett provided to the subcommittee, Professor Charles W. Wolfram of Cornell University School of Law, commented that, "(S)exual relations with a client pose a tremendous threat to a lawyer's independent professional judgment. . . . "

C. Attorney Registration and Disciplinary Commission

1. Oral Report

In his oral report, Mr. James J. Grogan of the ARDC addressed the Professional Responsibility Committee on April 5, 1991, touching upon a number of issues and information sources, including *Suppressed v. Suppressed* discussed, *infra*, in Section II pertaining to the problem of attorney/client sexual relationships. Mr. Grogan explained the ARDC receives some complaints each year

alleging improper attorney sexual conduct.[9] He has himself handled reviewed more than a dozen reports in a year alleging attorney sexual misconduct. He explained the ARDC's prosecution of sexual misconduct complaints is hampered by evidentiary problems. In most cases, investigation reveals that the only evidence is the complainant's testimony; absent any corroborating evidence, this testimony is insufficient to cause the ARDC to bring charges against the lawyer. The difficulty in establishing the minimum proof necessary to file a complaint may act as a safeguard against misuse of a specific rule regarding attorney sexual misconduct. However, Mr. Grogan stated he would support a rule change if adopted by the Illinois Supreme Court. Interestingly, according to the *Chicago Lawyer* article discussed *infra*, John O'Malley, the Administrator of the ARDC, favors such a rule.

2. Written Materials

One source of information provided by Mr. Grogan was a law review article by Lawrence Dubin entitled "Sex and the Divorce Lawyer: Is the Client Off Limits?" 1 Geo.

---

[9] Mr. Grogan did not give exact figures but the judge in the concurring opinion in *Kantar, infra*, as well as the *Chicago Daily Law Bulletin* article from the April 20, 1991 issue, *supra*, indicate that 1.0% of all complaints to the ARDC concern attorney sexual misconduct. This 1.0% comes to about 50 complaints relating to attorney sexual misconduct. If only half of these complaints are valid, it would mean that 25 individuals are being sexually exploited by the lawyers and the system, that they have turned to for help in a time of need each year.

Jour. of L. Ethics 585 (1988). Professor Dubin[10] argues that a sexual relationship between an attorney and a client, especially the divorce client, is an abuse of the trust a client places in the lawyer. A sexual relationship between attorney and client can compromise the confidential nature of the attorney-client relationship; can interfere with the attorney's professional judgment; can even lead to actions prejudicing the client's interests.[11]

Dubin concludes that while many attorneys feel current rules sufficiently address these abuses, a specific rule is needed for two reasons. First, the use of various general provisions in the rules do not give lawyers sufficient notice of the ethical improprieties of their sexual misconduct. Second, without this notice the public does not enjoy adequate protection from unscrupulous attorneys.[12]

D. Northwestern University Legal Clinic

Professor John S. Elson and Assistant Professor Cynthia Bowman, faculty members at Northwestern University Law School and also members of the Northwestern University Legal Clinic, presented anecdotal evidence of the increasing number of women who complain of sexual manipulation by lawyers, based on their experience at the Northwestern University Legal Clinic.

---

[10] Lawrence Dubin is Professor of Law at the University of Detroit School of Law and Former Chairman, Michigan attorney Grievance Commission.

[11] Dubin, Lawrence, "Sex and the Divorce Lawyer: Is the Client Off Limits?", 1 Geo. Jour. of L. Ethics 585, 614 (1988).

[12] *Id.* at 619.

Professor Elson, who represented the plaintiff on appeal in *Suppressed v. Suppressed*, 206 Ill. App. 3d 818, 565 N.E.2d 101 (1st Dist. 1988), reported that two other women come [sic] forward with grievances to ARDC against the attorney charged in *Suppressed*. Further, he was personally aware of two additional victims who have not yet come forward.

In fact, Professor Elson had represented a plaintiff in a federal court action against the same lawyer who was the defendant in the *Suppressed* case.[13] These incidents of alleged misconduct by this attorney span a 16-year period.

Professors Elson and Bowman agree with Mr. Grogan of the ARDC in that the most serious hurdle to overcome is the pitting of the complaining client's word against that of the responding lawyer. In his experience, Professor Elson commented that the ARDC will not proceed in the absence of corroborating evidence. Professors Elson and Bowman felt that a specific rule regulating attorney-client sexual relations is needed if for no other reason than to assure the public that measures are being taken to protect clients from sexual exploitation by lawyers. Mr. Elson recommended that a separate cause of action addressing attorney sexual misconduct should be created by the Illinois legislature.

---

[13] *Jane Doe v. John Roe and Roe and Roe Ltd.*, 756 F. Supp. 353 (N.D. Ill., 1991).

E. Practitioner's Viewpoints

The final source of background information was the legal news media, particularly several recent articles that expressed support for the implementation of a rule regulating attorney-client sexual relations.

The *National Law Journal* published two articles relevant to the subcommittee's investigation:

(a) The April 15, 1991 issue of the *National Law Journal* contained an opinion column by Yale Law School Professor Geoffery C. Hazard Jr., a nationally recognized legal ethics expert. He concluded that attorney-client sexual relationships pose problems requiring action by the legal profession. While present rules regarding conflicts of interest as well as general rules prohibit such sexual relationships, a specific rule governing attorney-client sexual relations was necessary.

(b) The second article, appearing in the July 1, 1991 *National Law Journal,* expressed the opinions of Peter J. Riga, a Houston, Texas solo practitioner. Mr. Riga stated that the incidence of attorney sexual misconduct is higher than is generally admitted, but offered no statistical support for this opinion. A noteworthy point raised by Mr. Riga is that the legal profession has done little to establish a factual base showing whether attorney-client sexual relationships are prevalent or a rare phenomenon. A specific rule needs to be established to prevent irreparable harm to the legal profession, he concluded.

While reaching their positions by different routes, and perhaps for different reasons, both Mr. Riga and Professor Hazard, the sole practitioner and the ethics

scholar, agree on one thing – a specific rule addressing attorney/client sexual relationships is needed and long overdue.

(c) On September 14, 1991, the *Chicago Lawyer* addressed in a comprehensive fashion the problem of attorney-client sexual misconduct in Illinois. The article covered many of the opinions and issues discussed in this report. A copy of this article is attached.

II.

Existing Ethical Guidelines

The subcommittee reviewed existing case law and ethics decisions to determine which ethical rules have been applied to censure lawyer sexual misconduct and to determine whether these existing rules adequately inform both lawyers and the public of the expected standards of lawyer conduct.

A. Illinois Cases

Illinois does not have a specific ethical rule regulating attorney/client sexual relations. Currently, Illinois lawyers may be subject either to criminal penalties or to ethical violations under Illinois Rules of Professional Conduct 1.7 (conflicts of interest) or 8.4(a)(5) (conduct prejudicial to the administration of justice), or possibly Illinois Supreme Court Rule 771.

Only a handful of reported Illinois decisions have considered attorney-client sexual relationships, including *Suppressed v. Suppressed*, 206 Ill.App. 3d 918, 565 N.E.2d 101 (1st Div. 1st Dist. 1990) and *In re the Marriage of Sherry*

Kantar, slip op 1-89-3289, (Ill. App. 1st District, July 10, 1991) and *Jane Doe v. John Doe*. 756 F.Supp. 353 (N.D. Ill. 1991).

In *Suppressed*, the most publicized Illinois case, a client alleged her divorce lawyer coerced her into an unwanted sexual relationship. The plaintiff had first filed an ARDC complaint in July, 1987, about four years after commencement of the alleged sexual relationship. After investigation, the ARDC closed the matter and took no action. Then, she sued in the Circuit Court of Cook County in December, 1988, but the complaint was dismissed as barred by the two year statute of limitations. The court did not reach the question of whether the client-plaintiff had a cause of action, but rather decided that if a cause of action existed, it would be in the nature of a personal injury and thus, subject to the two year limitation.

On appeal, plaintiff argued that a cause of action was stated for breach of fiduciary duty – characterizing it as a "breach of an unwritten contract for legal services"[14] and therefore, subject to the longer five year limitations period for contract cases. However, the court held that while legal malpractice was subject to the five year statute, the plaintiff had failed to plead facts supporting a legal malpractice claim.

As characterized by Northwestern University Professor John Elson in his brief for plaintiff, in Illinois, a client alleging emotional distress as a result of engaging in unwanted sexual advances by his or her lawyer, has no

---

[14] *Id.*

claim for a breach of fiduciary duty unless the lawyer explicitly made sex a condition for representation.

The Appellate Court specifically held that the lawyer's alleged ethical misconduct should not be litigated in court, but rather before the ARDC. Justice Murray, writing for the Court, noted that if sexually exploitative conduct is to be actionable, a separate cause of action had to be created by the Illinois legislature.

Despite the Appellate Court's affirmance of the trial court's decision, Justice Murray, in dicta, noted his belief that a lack of abundant case law on the subject of attorney/client sexual relationship is no indication that such activity does not occur.[15] Furthermore, he agreed with plaintiff's argument that a separate cause of action should exist for breach of the lawyer's ethical duty.[16] Furthermore, he agreed with plaintiff's argument that a separate cause of action should exist for breach of the lawyer's ethical duty.

Another Division of the Appellate Court in *In re the Marriage of Kantar*, 1-89-3289 (July 10, 1991), a fee petition action, touched the issue, but declined to resolve whether an alleged sexual relationship breached the lawyer's fiduciary duty.

In *Kantar*, a female client contested her fee agreement, alleging it was procured by her lawyer's undue influence, coercion, misrepresentation and intimidation by having to engage in sex with him on 20 occasions. She

---

[15] *Id.*

[16] *Id.*

also alleged the billings were untruthful and inaccurate. The allegations of improper fees would be sufficient to vacate a previously entered judgment awarding fees, and the decision ended on this procedural note.

Justice Greiman wrote a special concurring opinion, directly addressing the alleged sexual relationship and the profession's " 'dirty little secret.' " *Slip op.*, at 15. He found that a "divorce lawyer who has sexual intercourse with his client, has engaged in a *per se*" conflict of interest violation under Rules 1.7 (general conflict of interest provision) or 3.7 (prohibiting a lawyer from acting as a witness in a case in which he represents a client). *Id.* at 17.

In a fiduciary capacity, Justice Greiman reasoned, a divorce lawyer has a duty to place his client's interests first, especially in the areas of child custody and reconciliation, which are compromised when the lawyer and client are sexually involved. *Id.* at 18. Further, because adultery remains a ground for divorce, the lawyer might be called to testify adversely to his client and that testimony might impair his client's property distributions and custody decisions. A sexual relationship between a "domestic relations lawyer and client . . . [is] a per se conflict of interest," he added.

In *Doe v. Roe*, the Seventh Circuit only discussed the issue of fees in that the fees should not include time billed for sex. That Court never discussed the impropriety of the act itself. Moreover, in the *Kantar* case, *infra*, the petitioner, Sherry Kantar, appealed the Circuit Court's granting of a summary judgment in favor of her attorney. Petitioner claimed that during the cause of the representation her attorney coerced her into a sexual relationship

and his fee reflected charges for time spent in this intimate relationship. While the decision of the appeals court was favorable to petitioner, it was based on procedural grounds and did not address the substantive issue of whether the coerced sexual activity was a breach of that lawyers' fiduciary duty.[17]

In a separate specially concurring opinion, Justice Greiman wrote that while agreeing with the holding of the court, he felt the issue of sexual misconduct should have been addressed. The judge stated that he felt that a sexual relationship between a "domestic relations lawyer and client . . . [is] a per se conflict of interest." *Kantar,* slip. op. at 15. Justice Greiman went on to opine that "the present rules governing professional conduct *may* be adequate." *Kantar,* slip. op. at 21. (emphasis added) Justice Greiman's specifically concurring opinion remains the only judicial pronouncement chastising sexual involvement, under duress, as a breach of a lawyer's fiduciary and ethical duties.

B. Other Jurisdictions

1. Commonly Used Disciplinary Grounds

This Report contains a representative sample of the research of the Subcommittee.

---

[17] The court stated that it did not need to deal with the issue of breach of fiduciary duty because "the alleged attorney fees' impropriety alone would be sufficient reason, if proven, to vacate the judgment." *Kantar,* Slip Op. @ page 13.

(a) Moral Turpitude or Lack of Fitness to Practice.

The most common disciplinary grounds employed to punish lawyers for improper sexual relations with their clients rest on a finding the lawyer engaged in conduct involving moral turpitude or conduct establishing a lack of fitness to practice. Those grounds were used by the Indiana Supreme Court to publicly reprimand an attorney for. grabbing a female client, kissing her and raising her blouse. *See, In the Matter of Adams,* 428 N.E.2d 756 (Ind. 1981). In Illinois, this provision is found in Rule 8.4(a) (the general misconduct provision text is in the Appendix). This general rule is used to discipline lawyers when they have cheated on taxes or engaged in other criminal conduct involving dishonesty, deceit and misrepresentation.

(b) Breach of Fiduciary Duty/Conflict of Interest.

Another disciplinary theory joins together a breach of fiduciary duty with a conflict of interest. The conflict of interest rules prohibit continuing or engaging in a representation when the lawyer's independent professional judgment is compromised by self-interest and prohibit a lawyer's use of confidential information to the client's disadvantage. In this instance, discipline is based on a breach of Rule 1.7(b) (general conflict of interest rule prohibiting representation if the lawyer's responsibilities may be limited by self-interest), or Rule 1.8 (prohibiting the lawyer's use of confidential information for his or her own interests (full text of rules in Appendices).

Courts have reasoned with intelligence and logic to apply these general rules, as the following discussion reveals. However, the absence of a specific rule risks producing a disciplinary decision that simply fits into a rule, a decision which may not provide adequate guidance to lawyers in the future, or safeguard them from unfounded allegations, or adequately inform the public of its rights and expectations of proper lawyer conduct.

Our ethical rules specifically regulate lawyers' efforts to enter into book contracts with clients, except under limited circumstances, and bar criminal lawyers and divorce lawyers, in all but limited circumstances, from taking contingent fees. If the execution of a book contract is specifically regulated (an uncommon enterprise for probably 99% of lawyers), but necessary to prevent commercial exploitation of the client, then there certainly is room, too, for a rule regulating the sexual exploitation of a client – the risk of emotional and psychic harm to the client is far greater than an unfair book contract.

2. Lack of Clearly Articulated Standards Creates Uncertainty

When a jurisdiction lacks precise standards governing sexual relations between lawyers and clients. the risk of uneven application of legal principles rises. No meaningful guidance is provided either to lawyers or to the public whom they serve or the administration of justice. One lawyer in Iowa advanced this argument. *See, Iowa State Bar Association v. Durham, infra.*

Certainly, criminal laws are available to prosecute a lawyer engaged in prostitution or solicitation, but these

are drastic remedies, only reaching a lawyer engaged in egregious conduct. More often, a sexual liaison is created in the quiet of the office, after hours, primarily when the client is undergoing the stress of a divorce of the loss of a loved one in another context. Then, the client is vulnerable – coping with abandonment, rejection, and may seek a comforting relationship or be fearful that declining sexual advances will mean the loss of representation, and yet another rejection.

Examples of imprecise and vaguely worded standards are found in two decisions from the Supreme Court of Wisconsin in *In the matter of Disciplinary Proceedings Against John W. Gibson*, 124 Wis. 2d 466, 369 N.E.2d 695 (1985), *app. dism'd, Gibson v. Bd. of Attorneys of Professional Responsibility*, 474 U.S. (1985) and *State v. Heilprin*, 59 Wis.2d 312, 207 N.W.2d 878 (1973), both attorney disciplinary proceedings.

Heilprin is the matrix case, involving a lawyer who was exceptionally abusive in all of his conduct both in and out of court. His abusiveness was aggravated by two incidents when he talked obscenely, made indecent gestures and indecently exposed himself to two female clients in separate incidents. The Court did not discuss or cite a single ethical rule, *Heilprin, passim*, or establish any standards to guide future decisions, except to say, "Conduct of the type engaged in by Heilprin cannot be condoned, whatever the case. The public must not be exposed to this type of action from members of the legal profession." *Id.* 59 Wis. 2d at 322.

Twelve years later, *Gibson* came before the Court, involving a lawyer who made unsolicited sexual

advances to a female client while representing her in a temporary restraining order in a domestic relations case. In his office the night before the TRO hearing, the lawyer kissed the client and moved his hands over her body. She asked him to stop he did, but told her this was in confidence, and necessary to relieve his sexual tensions.

The referee recommended a 90-day suspension for Gibson's violation of SCR 20.3(1):

> (1) A lawyer may not intentionally"
>
> . . .
>
> (c) Prejudice or damage the client during the course of the professional relationship, except as required under SCR 20.36(2).

The referee also found Gibson violated the following provisions:

> SCR 20.02(5): A lawyer should maintain high standards of professional conduct . . . and should refrain from all illegal and morally reprehensible conduct; SCR 20.23: The professional 3udgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. . . . his or her personal interest . . . should not be permitted to dilute a lawyer's loyalty to a client; and SCR 20.48: A lawyer should avoid even the appearance of professional impropriety . . . A lawyer should promote public confidence in our system and in the legal profession.

Gibson, 369 N.W.2d at 696, nn.1,2.

Refusing to find Gibson violated one of these rules, the Supreme Court held, instead, his "actions violated a

standard of attorney professional conduct we set forth in *State v. Heilprin, supra,* which involved an attorney charged with conduct similar to but more aggravated than Attorney Gibson's." *Gibson,* 369 N.W.2d at 699.

The Court recited the *Heilprin* language that the public should not be exposed to such conduct, nor can it be condoned. Consequently, Gibson was guilty of a general ethical violation, SCR 21.05, providing:

> Grounds for Discipline. An attorney is subject to discipline for misconduct. Misconduct is conduct that violates:
>
> . . .
>
> (5) A standard of professional conduct as defined by the supreme court by rule, order or decision.

Id.

The Court further explained that clients, when facing difficulties, may be vulnerable to improper advances and be reluctant to terminate a representation for fear of losing time and money. *Id.*

As the lawyer stands in a fiduciary position to the client, he must exercise professional judgment solely for the client's benefit, unfettered by compromising influences and loyalties, as expressed by SCR 20.23(1). Making "unsolicited sexual advances to a client, an attorney perverts the very essence of the lawyer-client relationship." *Id.* at 700.

Both *Gibson* and *Heilprin* fail to articulate a cognizable, definable standard. Saving the public from exposure to indecent, unsolicited sexual conduct is certainly

obvious, but the decisions, especially *Gibson*, dance around the question of which ethical provision was violated. The reference to the rule on the duty of uncompromised loyalty is helpful, but that was not the articulated violation. It seems the Court did not want to face the questions, analyze the ethical rules or ethical considerations directly, preferring, instead, a common law approach to attorney sexual misconduct, leaving the creation of concrete standards to another day.

Later, in *In re Ridgeway* No. 90-1213-D (Nov. 27, 1990), the Wisconsin Supreme Court affirmed a six-month suspension to a public defender who had sexual contact with a client who was on probation. Violating the terms of her probation, he met her in a motel, gave her some beer, and had some sexual contact with her. The Court affirmed the referee's conclusion the public defender, by causing his client to violate her probation, and while having sexual contact with her while representing her, the lawyer's representation was materially limited by a conflict of interest in violation of SCR:1.7(b), based on ABA Model Rule 1.7, prohibiting a lawyer from continuing a representation because of the lawyer's own interests.

This decision departs, then, from the *Gibson* and *Heilprin* line, offering a little more guidance, but fails to provide specific rules and a concrete rationale for prohibiting conduct in this complex area of human relationships.

3. An Example of Clearly Articulated Standards

In striking contrast, far greater clarity and precision was generated by Alaska Bar Association Ethics Committee Op. 88-1 (1/9/88), determining a lawyer cannot engage in sexual relations with a client if (1) the lawyer initiates the relationship and the client's ability to make a free choice is impaired; (2) the lawyer performs legal services in exchange for sex; (3) the sexual involvement inhibits the lawyer's ability to protect the client's interest; (4) the sexual relationship may adversely affect the client's emotional stability; or (5) the sexual conduct is illegal. If the sexual relation pre-exists, the formation of a subsequent attorney-client relationship is proper. Op. 1987-2 (undated) of the State Bar of California echoes these conclusions.

Well-defined guidelines, specifically stating the conduct that is prohibited, inform lawyers of their obligations, protect them from the unfounded or vicious retaliation of a disappointed or disaffected client, and reflect an awareness and a responsibility by the profession to articulate publicly its standards.

Gibson and *Heilprin* impose no real standards, because they do not provide. precise guidelines to determine the conduct to be prohibited. These decisions do not clearly state all the elements of an ethical breach, which would lead to the imposition of a precise burden of proof on the disciplining authorities.

4. Misconduct Involved Moral Turpitude or Lack of Fitness to Practice

A common basis for lawyer disciplinary action rests on Rule 8.4 and its Code counterpart DR 1-102(A)(3) and (6). In *Committee on Professional Ethics & Conduct of the Iowa Bar Association v. Durham*, 279 N.W. 280 (Iowa, 1979), the Supreme Court of Iowa addressed the illegality of the sexual fondling by a female attorney of a male prisoner in a penitentiary. The Supreme Court ruled that the caressing and fondling was not illegal but warranted reprimand under the Iowa Rules of Formal Conduct. The lawyer argued that the rules were vague and did not provide due process notice. Sometimes, the lawyer is convicted of criminal sex offenses, which is the basis for the disciplinary action. Other times, the lawyer's conduct is found, through a disciplinary hearing, to involve moral turpitude or to reflect adversely on the lawyer's fitness to practice.

A lawyer's duty to act in the client's best interests prompted the Supreme Court of Iowa in *Iowa State Bar v. Hill*, No. 23-99-1695 (November 22, 1989, to suspend a lawyer for six months for requesting sex in lieu of fees from a client he represented in a divorce action. The lawyer violated Rule 8.4 (misconduct involving turpitude or adversely reflecting on fitness to practice). Additionally, as a divorce lawyer, he should have known that sexual relations could interfere with reconciliation efforts and custody questions. The relationship was commercially exploitative.

The Supreme Court of Minnesota in *In the Matter of Peters*, 428 N.W.2d 375 (S. Ct. Minn. 1988), held that DR

1-102(A)(6) (conduct reflecting adversely on fitness to practice) was breached when Peters, then, a law school dean, repeatedly engaged in unsolicited and unwelcomed sexual physical contact and made suggestive verbal advances to four employees, two of whom were law students. The Court considered sexual harassment laws, embodied in the Minnesota Human Rights Act, which forbid the creation of a hostile work environment.

This case is significant because it finds that lawyer's ethical duties and professional responsibilities are not confined to the attorney-client relationship, but extend to contexts other than when acting in a professional capacity.

Lawyers have been disbarred for engaging in fraudulent business transactions, since both clients and non-clients have a right to assume lawyers will act fairly and honestly in all dealings. Further, this lawyer was a dean and an employer with significant power and authority over law students and a duty to insure that sexual harassment was not generated in an academic setting. Thus, " . . . the numerous instances of sexual harassment perpetrated by respondent" as a dean "in the presence of students and faculty signals an indifference to ethical obligations and a disregard for the law" reflecting adversely on his fitness to practice law. *Id.* at 382.

In the Matter of Stanton, 103 N.M. 413, 708 P. 2d 325 (1985), involved a public defender who was convicted of attempted criminal sexual conduct with one of his female clients. The Court's decision was tersely worded, finding the lawyer's conduct was damaging to his client, and in violation of Disciplinary Rules 1-102(A)(3) (engaging in

conduct adversely reflecting on fitness to practice); 7-101(A)(3) (prejudicing or damaging client during professional relationship). The decision contains no discussion of these Rules, however, just a citation to them.

5. Breach of Fiduciary Duty

Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 369 (1st Dist, Div. 3, 1983) arose initially when the lawyer sued the client for fees owed; she cross-complained in battery (for having engaged in unprotected sexual contact causing an ectopic pregnancy, which ended in her sterilization) and tort for deceit for fraudulent and negligent misrepresentation in gaining her consent to engage in sexual intercourse. The Court upheld most of her theories, which had been dismissed below, but declined to find a breach of California's lawyer ethics rules.

The lawyer had a fiduciary obligation to the client that arises when "the parties do not deal on equal terms, because the person in whom trust and confidence is [sic] reposed and who accepts" them "is in a superior position to exert unique influence over the dependent party." *Id.*, 145 Cal. App. 3d at 432.

Since an attorney-client relation is a " 'fiduciary relation of the very highest character,' " prohibiting an attorney from deceiving a client, from gaining financial advantage over a client, the Court found that the same principles, involving financial claims, should apply when the client "alleges physical damage resulting from" a fiduciary breach. *Id.*

The Court refused to declare as a matter of law the lawyer breached his fiduciary duties, holding, instead the "question of a confidential [fiduciary] relationship is a question of fact, requiring the client to prove its existence;" once established the lawyer has the burden of establishing informed, freely given consent on the battery claim or that her reliance was not justified in the misrepresentation claim. *Id.* The Court specifically declined to find the lawyer breached California lawyer ethics rules, deferring to the State Bar of California.

It was not until this year, 1991, that the State Bar of California finally passed an ethical rule regulating sexual conduct between lawyers and clients.

The Board of Governors of the Oregon State Bar, Op. 475 (6/82), issued an advisory opinion declaring it unethical for a lawyer to be sexually involved with a client going through a divorce. The ethical breach was based on DR 5-101(A), requiring a lawyer to decline employment if the lawyer's independent professional judgment may be affected by the lawyer's personal interests, unless the client consents. Similarly DR 1-110(B)(2) and (C)(2) discuss mandatory and permissive withdrawal when lawyer's interests conflict with client's.

In sum, the opinion concluded, the ethical rules recognize that competent representation mandates the exercise of independent professional judgment, which is compromised, especially in a divorce action, where the best interests of the client might reside in a reconciliation, which would be thwarted if the lawyer were sexually involved with the client.

Further, because the attorney-client relationship is a fiduciary one, in which the client is dependent on the lawyer, an emotional involvement may make impossible voluntary, informed client consent to the continued representation, but such consent is vital to avoid the conflict of interest.

6. The California Disciplinary Rule

The California legislature adopted ethics Rule 3-120 on April 30, 1991, a specific rule governing sexual relations with a client.[18] The Rule resulted from the

---

[18] Attached is a copy of the rule in its entirety. The State Bar of California on April 20, 1991, adopted ethics Rule 3-120, which sets forth guidelines on sexual relationships between lawyers and clients. In order to go into effect, the rule must be ratified by the California Supreme Court. If ratified, the rule, excerpts of which follow, becomes the nation's first to restrict such sexual relationships.

(A) For the purpose of this rule, "sexual relations", means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification or abuse.

(B) A member shall not:

(1) Require or demand sexual relations with a client incident to or as a condition of any professional representation; or

(2) Employ coercion, intimidation or undue influence in entering into sexual relations with a client; or

(3) Continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of Rule 3-110.

California legislative enactment passed in 1989, requiring the creation of a specific rule governing sexual relations with a client. First, a member of the bar shall not require or demand sexual relationships from a client, in other words, not make it the *quid pro quo* for representation. Second, the attorney should not coerce, not coerce, [sic] intimidate or use undue influence in advancing sexual relations with a client. Finally, the lawyer should withdraw from the representation if that is the likely result because of sexual relations.

The compromise rule came after the January meeting of the bar association. At that meeting, the California Committee rejected an outright ban on sex between lawyer and client as too strict. Also, it rejected as too weak a rule prohibiting lawyers from requiring or demanding sexual relations with a client. Rule is currently awaiting Supreme Court approval and is sent out for a 90 day period to Bar Associations and firms for review.

(C) Paragraph (B) shall not apply to sexual relations between members and their spouses or to ongoing consensual lawyer-client sexual relations which predate the initiation of the lawyer-client relationship.

(E) A member who engages in sexual relations with his or her client will be presumed to violate Rule 3-120, paragraph (B)(3). This presumption shall only be used as a presumption affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules.

III.

SUBCOMMITTEE CONSIDERATION OF POSSIBLE RECOMMENDATIONS

This section briefly summarizes the subcommittees debates and the advantages and disadvantages of the potential recommendations.

A. Preserve the Status Quo.

The current Illinois Rules of Professional Conduct, promulgated in 1990, do not specifically prohibit a sexual relationship between an attorney and a client. Some lawyers contend the Illinois Rules of Professional Responsibility contain enough general provisions to safeguard clients from attorney sexual misconduct or sexual exploitation. Professor Hazard, as noted earlier, recognized this position, too, but still opted for a specific rule, because the disciplinary rules regulate other "potentially exploitative relationships" even though they may fall within the general conflict of interest prohibitions of Rule 1.8, such as business dealings with clients, receiving gifts and book contracts." Hazard, "Lawyer-Client Sex Relations Are Taboo," National Law Journal, April 15, 1991 p. 14, col. 2.

The subcommittee first considered recommending that no rule amendment be proposed, thus preserving the status quo. Certainly, this position has support among many members of the Chicago bar as a recent article in the September, 1991 issue of *The Chicago Lawyer* clearly

revealed (a copy of the article is attached as an Appendix). The same article, however, discloses adamant sentiments held by an equally impressive array of lawyers who believe a rule amendment is necessary.

The subcommittee concluded, in light of the body of material it reviewed, that the current rules should be amended to set out clearly defined guidelines to prohibit sexual exploitation of clients.

Justice Greiman in *Suppressed, infra* points out that in 1989 about 1% of the 5,000 complaints received by the Illinois Attorney Registration and Disciplinary Commission involved attorney/client sexual encounters. To the subcommittee's knowledge, and according to the ARDC's James Grogan, there has never been a disciplinary action against an Illinois attorney resulting from an allegation involving a sexual encounter with a client. Northwestern University Law School professor John Elson told the subcommittee he knew of at least one attorney who was the subject of.a series of complaints filed by different clients over a time span of more than a [sic] sixteen years; yet, no disciplinary action resulted.

Against this backdrop of disciplinary inactivity, the subcommittee considered:

- the emerging trend in California and other jurisdictions to regulate attorney-client sexual relations;

- the Illinois legislature's determination that some regulatory mechanism should be directed to attorney-client sexual relations;

– the voluntary agreement of matrimonial lawyers among themselves that ethical standards should be imposed on a lawyer's sexual relations with a client;

– the recent spate of Illinois decisions, including Justice Greiman's forceful special concurring opinion in *Kantar;*

– the in-house training programs of several Chicago law firms discussing unacceptable relationships.

B. Propose New Rule.

Some of the inability to send a clear message to the bar and to the public at large about a lawyer's ethical responsibilities when a sexual relationship is contemplated may well be a result of the lack of a coherent, consistent legal theory, a problem which is easily remedied by the promulgation of a specific rule.

The subcommittee's proposed rule regulating sexual relations between attorney and client offers a clearer definition of prohibited behavior and acts as a deterrent.

1. Apply Rule to Entire Bar.

While the information the subcommittee received indicated that key figures in client sexual misconduct or exploitation include members of the matrimonial bar, reports were not isolated to the specialty of matrimonial lawyers. Incidents of sexual misconduct or exploitation generally occurred in a situation where the client was (1) financial dependent or (2) emotionally vulnerable.

None of these scenarios is unique to members of the divorce practice and their clients. Reference cases involve both male and female attorneys, as well as criminal and commercial lawyers. Inherent in every attorney-client relationship is the superior position of the attorney because the attorney possesses access to the legal system. While probate or divorce lawyers probably have the most personal contact with clients in highly stressful situations, criminal lawyers and other civil litigators' intense work conditions also require extended contact with clients in the course of the professional relationship. Thus, the subcommittee concluded that it would be inappropriate to restrict the rules' applicability to one specialty in the bar.

To focus on one "legal specialty" would be inconsistent with the general fabric of the Illinois Rules of Professional Conduct which is supposed to apply to all lawyers.[19] While both criminal and divorce practitioners are prohibited from accepting contingency fees, for example, because of important social Policy reasons, the regulation of sexual activities between lawyers and clients should extend to the entire bar.

2. Reject Presumption.

During the course of the subcommittee's consideration, two members of the Northwestern Law School faculty, Cynthia Bowman and John Elson, discussed the

---

[19] New York Times article March 15, 1991, *Keeping Sex Out of Law Office.*

role of presumptions in the development of a rule relating to attorney/client sexual relations. After careful analysis, the subcommittee rejected a solution which depended, to any considerable extent, upon explicit presumptions.

Formal presumptions, as such, can take the place of evidence or can shift the burden of proof or can shift the burden of going forward with the evidence. They can be irrebuttable or if rebuttable can be overcome by slight evidence or by the quantum of evidence required to establish a proposition of fact. In short, the word "presumption" requires explicit qualification to be meaningful or useful in the context of a rule of law or rule of procedure or a rule of professional conduct.

For example, it has been repeatedly urged that many of the charges of sexual impropriety by an attorney fail to get beyond initial screening by the ARDC apparently because the occurrence of sexual relations cannot be established by clear and convincing evidence, *i.e.*, the client claims an incident has occurred, the attorney denies it and there are no eyewitnesses or circumstantial evidence to support the client charges. A rebuttable presumption that sexual relations occur whenever an attorney and client meet behind closed doors would dramatically resolve the ARDC's proof problem but would be remarkably unfair to the bar and would result in rendering it prudent for a credible third party to be present at all confidential attorney/client conferences.

Another type of presumption which the subcommittee expressly rejected is that whenever sexual relations exist between an attorney and client, the attorney is no

longer able to act competently or exercise independent judgment or act in the best interest of the client thereby placing the burden of establishing the contrary (or at least going forward with evidence to the contrary) upon the attorney.[20]

A presumption that a conflict of interest between an attorney and client exists whenever sexual relations between them occur is likewise unwarranted. Indeed, it is only in those situations in which another interest of the client is adversely affected by the sexual relations, e.g., fitness of a client to have the custody of a child, that such conflict becomes obvious. In such cases, establishing damage to the interest of the client does not require a presumption; it is readily susceptible of proof.

The right of a licensed attorney to continue to practice law is as valuable a right as the right to liberty and the right to property. In this context, the subcommittee considered the presumption of innocence which prevails in the criminal law and the "presumption" in favor of a defendant in civil litigation. Although disciplinary cases are *sui generis*, the burden should continue to be placed on the disciplinary authority to establish each element in a contested disciplinary matter by clear and convincing

---

[20] C.f. proposed Senate bill:

The General Assembly in it [sic] act notes that "the General Assembly further finds and declares that it is difficult to separate sound judgment from emotion or bias, which may result from sexual involvement between an attorney and his or her client during the period that an attorney/client relationship exists and that emotional detachment is essential to an attorney's ability to render competent legal services."

evidence. Presumptions of disciplinable misconduct are as inconsistent with American jurisprudence as would be presumptions of guilt in criminal matters or presumptions of liability in civil cases.

It has been argued that a type of presumption does exist in the attorney/client relationship when conflicts involving financial or commercial dealings develop. Because of the trust conferred in the attorney by the client in this fiduciary relationship and because of the superior knowledge and experience of the attorney, the burden is placed upon the attorney to establish that the attorney acted toward the client fairly and without overreaching. This burden placed upon the attorney because of the fiduciary relationship and superior position of the attorney is nevertheless properly limited to matters involving money or property where the client's ability to act at arm's length has been affected by the trust and faith which is reposed in the attorney.

There is no compelling analogy between an unsophisticated client trusting rights to money or property to an attorney and a client otherwise aware of what was going on around her or him engaging in sexual relations with an attorney. The element of deception or fraud committed by a fiduciary, which element justifies shifting the burden of proof of propriety to the attorney, is totally lacking where the client who may or may not have freely engaged in sexual relations with his or her attorney was nevertheless aware of what was happening and quite competent to give testimony concerning what occurred and the surrounding circumstances. Put simply, there is no need for a presumption of duress, undue influence or vulnerability; they are all subject to proof and do not

require that a burden be placed on the respondent to prove a negative in order for justice to be done or the public protected from unfit attorneys.

3. Reject Per Se Prohibition.

The subcommittee has considered a proposal that would absolutely prohibit any sexual contact of any kind between an attorney and client through the period of representation.

An argument can be made that the public policy of Illinois favors marriage as an institution, disapproves of adultery and criminalizes open and notorious public lewdness. Nevertheless, a rule that would subject an attorney to discipline for sexual relations with a client under circumstances in which the activity was undertaken with the full and knowing consent of an entirely competent client would be patently overboard [sic] and serve no demonstrable purpose in Protecting the public from unfit lawyers.

The subcommittee cannot agree with a proposition which asserts that a relationship between consenting adults which would otherwise be permissible should automatically become disciplinable when one of the parties happened to be a licensed attorney and gave legal advice to or performed legal services for the other.

While lying to, stealing from or cheating clients is entirely inconsistent with the rules of professional conduct designed to prohibit such activity, nevertheless the sexual mores of the times now appear to have reached the point where sexual relationships are no longer narrowly

and strictly confined to married couples and even "living in sin" is no longer considered particularly sinful. The subcommittee has concluded that a license to practice law does not carry with it sexual standards – which are more stringent than those necessary to protect the public and its respect for our profession.

The subcommittee considered and rejected the approach of an absolute prohibition of attorney/client sexual relations tempered by explicit exceptions to the rule. Examples of such exceptions might include the marriage of the attorney and client or a pre-existing less formal relationship between them. Other examples of appropriate exceptions could include a sexual relationship between an employed corporate staff attorney or house counsel and a member of an outside law firm retained to represent the corporation.

The concept of a general per so prohibition of sexual relationships between attorneys and clients subject to enumerated exceptions of the type indicated above is considered an unacceptable solution. Designation of exceptions to cover all of the various situations in which no valid public purpose would be served by a prohibition would be not only an impossible but an unnecessary task. The subcommittee concluded that the procedure of choice is to prohibit that which ought to be prohibited rather than to prohibit everything and then attempt to exclude conduct which should not be prohibited.

IV.

PROPOSED ILLINOIS RULE OF PROFESSIONAL CONDUCT 1.17

The Subcommittee proposed the following Rule 1.17 of the Illinois Rules of Professional Conduct:

Proposed Rule 1.17 Sexual Misconduct

(a) A lawyer shall not, during the representation of a client, engage in sexual relations with the client if:

(1) The sexual relations is the result of duress, intimidation, or undue influence by the lawyer; or

(2) The lawyer knows or reasonably should know that the client's ability to decide whether to commence in sexual relations is impaired by the client's emotional or financial dependency.[21]

(b) Where a lawyer in a firm has sexual relations with a client, the other lawyers in the firm shall not be subject to discipline solely because of the occurrence of such sexual relations.

(c) It shall not be a violation of this rule for a lawyer:

(1) To engage in consensual sexual relations with the lawyer's spouse or with a client with whom the lawyer was engaging in ongoing consensual sexual relations before the commencement of the attorney-client relationship; or

---

[21] The Rule developed from a proposal from William T. Barker and C. Harker Rhodes, with assistance from Steven F. Pflaum and George Overton.

(2) To engage in consensual sexual relations with a client of the lawyer's firm if the lawyer does not participate in the representation of that client.

"The lawyer-client relationship is one of trust and confidence."[22] The Illinois Rules of Professional Conduct are intended to maintain the integrity of the legal system, and to safeguard the public.

This proposal conforms to the existing Rules.of Professional Conduct in its tone, intent and limitations. It is not intended to be moralistic, but rather to describe professional behavior which respects the dignity of both the attorney and the client. The intent of any rule is not to enforce private remedies between parties or to punish the attorney but to preserve the public trust in the profession. The proposed rule is consistent with these goals, yet is drawn narrowly enough to make certain circumstances beyond its gambit.

After reviewing all the cases, data and interview results, the subcommittee concluded:

1. Though hard, statistical data is lacking to establish a pervasive pattern or practice of exploitative sexual relations between lawyers and clients, these relationships are, nonetheless, perceived by a cross-section of the legal and lay committees as an ethical issue requiring particularized attention by the bar.

2. The use of broadly worded and elastic ethical rules, such as 8.4, to reprimand inappropriate sexual conduct by lawyers does not serve either the public or

---

[22] Preamble, Illinois Rules of Professional Conduct.

lawyers. First, although the rules are designed as guides, the public should be informed that exploitative sexual conduct by lawyers is unethical and that this is a firmly held and strongly supported affirmation by the profession as a whole. To rely on Supreme Court Rule 771, conduct prejudicial to the administration of justice, as a basis to discipline lawyers may be legally logical, but is nonetheless difficult for the lay public to fully grasp.

Furthermore, the use of such elastic rules makes it difficult to establish firm lines between permissible and prohibited conduct, what may be perceived as inappropriate in one instance may be condoned in the next, according to the values of those who bring the charges. The existing Illinois Rules of Professional Conduct are not adequately specific in dealing with attorney client sexual relationships. If there is a special rule to discuss book contracts (Rule 1.8(b)), there should be one directed toward sexual relationships. The Rules most commonly involved are dangerous to both clients and attorneys because neither group receives adequate advance notice of what behavior is forbidden.

Rule 1.7(b), part of the general conflict of interest Rule could be defensively used to apply only where the conflict is obvious, e.g., in divorce cases where custody or reconciliation are precluded by the attorney's personal involvement with one of the spouses. Thus, the public may not be adequately protected by Rule 1.7. Similarly, the other rule sometimes cited, Rule 8.4, the misconduct rule (and specifically Rule 8.4(a)(5), the generalized "administration of justice" clause) also does not give any indication of "how far is too far" in the area of attorney-client sexual relations. Clients and attorneys exist in a

limbo of not knowing what behavior will be unacceptable. Illinois courts and the ARDC are without guidance in the absence of a specific rule.

As the report's Section II indicates, other jurisdictions seem to be willing to stretch the existing general rules only where the most egregious behavior has occurred and it is only egregious behavior that would be subject to criminal prosecution. This leaves many incidents acknowledged as inappropriate but without recourse. If the Bar agrees with the public that certain relationships are inappropriate, then, the Bar needs specific guidelines for disciplinary action and adequate protection of attorneys and the public.

Lawyers should be precisely and clearly informed of the standards to which they must adhere, not only so that they may conform their conduct to those standards, but also if an allegation is made, the elements of the purported wrongdoing are fixed so that the prosection [sic] and the defense are both fully and fairly informed of their respective burdens. No lawyers should lose the valuable privilege of practicing his or her profession except as a result of a breach of a clearly defined standard. Such a standard regulating sexual exploitation of clients does not presently exist in Illinois. Thus, a lawyer could engage in conduct that proves to be innocuous but a lawyer's reputation can be potentially seriously jeopardized.

Critics of a specific rule expressed a fear that it could be a basis for frivolous claims and therefore is ammunition against an attorney who, even though innocent, fears adverse publicity. Such an argument, however, is equally

if not more applicable to the present state of affairs under which the amalgam of rules applied to attorney-client sexual relationships gives neither party fair warning of what is unacceptable. It is the lack of notice and inconsistent results of complaints under the present Rules that the proposed Rule seeks to cure.

The risk of false or frivolous claims has never been and should not now be a reason for not having an appropriate rule on a subject. Criminal law faces this problem all the time in sex crime cases, but certainly no one would suggest that there not be laws prohibiting rape and other sex crimes.

The fear of misuse is unquestionably a real concern in fee disputes; an angry former client, possible [sic] displeased with the outcome of a case, may complain in order to extract an acceptable fee arrangement. Matrimonial lawyers, practicing in a field where anger is frequently diffuse, are especially susceptible to this scenario. Yet, as discussed earlier in Section B, matrimonial lawyers have enacted such a standard even with its inherent risks.

The procedures before the ARDC itself would be unchanged and therefore, provide protection where the evidence does not support the complaint. From the initial filing of a client allegation of wrongdoing to the actual Supreme Court action on the recommendations of the Commission, there are many safeguards. Confidentiality, including the name of any accused attorney, is preserved until the Hearing Board serves the attorney with a formal complaint *after* an investigation of the allegations by the Administrator and/or Inquiry Board, which includes an

opportunity for the attorney to respond to the allegations.[23]

The Illinois Tax Force on Gender Bias has pointed out that "although all sexual harassment charges are automatically referred to the Inquiry Board, the ARDC has never been able to prove a case, because the evidence present always pits the female clients' word against the male attorneys, which has invariably been regarded as inadequate under the burden of proof applied by the panels." Task Force Report, pages 54 and 55.

The level of proof required does not change under the proposed rule, and has historically guaranteed protection against frivolous claims. The risk for the attorneys must also be balanced against the risk to the client. This risk inheres to the legal process and is recognized in the concept of prosecutorial discretion, yet, of greater importance is due process of law and its component requirements of adequate notice and specificity in charging wrongdoing.

The nature of the attorney/client relationship is that the attorney with knowledge of and access to the legal system is in a position of power: status exploitation is possible. The presumption that clients need protection because of a potentially exploitative relationship resulting from the superior status of the attorney is similar to the presumption that minors need protection from exploitation by adults and that students need protection from

---

[23] Illinois Rules on Admission and Discipline of Attorneys, Rules 751-766.

exploitation by professors. A sexual relationship is unacceptable in all of those relationships because of the likely dependent and vulnerable status of one of the parties. The proposed rule is not so broad as to prohibit relationships where, for instance, there is no evidence of vulnerability and therefore, the indicia of exploitation are absent.

The public is waiting to see what Illinois attorneys will do. Silence might well be interpreted as either tacit approval, or, even worse, protection for the wrong party in these relationships. Other legal commentators, including Geoffrey Hazard of Yale, have admitted that "favorinq a rule does not mean that we are naive enough to believe that it is going to sufficiently change behavior of that small minority whose actions defy common sense." The proposed rule sends a message that the bar does not approve of such activities. For the first time, there will be a rule which gives clear notice to attorneys and clients of the bounds of acceptable behavior. The goals of the. Illinois Rules of Professional Conduct demand no less in order to maintain "public confidence in the integrity of the profession as a whole in the face of the egregious misconduct of a few."[24]

---

[24] *Preamble*, Illinois Rules of Professional Conduct.

APPENDIX F

ILLINOIS SUPREME COURT RULE 767(f) (1996)

* * *

(f) **Factors to be Considered.** The petition, shall be referred to a hearing panel. The panel shall consider the following factors, and such other factors as the panel deems appropriate, in determining the petitioner's rehabilitation, present good character and current knowledge of the law:

(1) the nature of the misconduct for which the petitioner was disciplined;

(2) the maturity and experience of the petitioner at the time discipline was imposed;

(3) whether the petitioner recognizes the nature and seriousness of the misconduct;

(4) when applicable, whether petitioner has made restitution;

(5) the petitioner's conduct since discipline was imposed; and

(6) the petitioner's candor and forth rightness in presenting evidence in support of the petition.

* * *

APPENDIX G

ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (Relevant Rules) (1980)

Rule 1-102. Misconduct

(a) A lawyer shall not

* * *

(5) engage in conduct that is prejudicial to the administration of justice.

* * *

Rule 4-101. Preservation of Confidences and Secrets of a Client

* * *

(b) Except when permitted under Rules 4-101(c) and (d) a lawyer shall not knowingly, during or after termination of the professional relationship to his client.

* * *

Rule 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment

(a) Except with the consent of his client after full disclosures a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

* * *

Rule 5-102. Withdrawal as Counsel When the Lawyer Becomes a Witness

(a) If a lawyer learns after undertaking employment in contemplated or pending litigation, or if it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and neither her or his firm, if any, shall continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in Rule 5-101(D)(1) through (4).

* * *

Rule 6-107. Avoiding Influence by Others than the Client

(a) A lawyer shall represent his client with undivided fidelity.

* * *

Rule 7-101. Representing a Client Zealously

(a) A lawyer shall not intentionally

* * *

(3) prejudice or damage his client during the course of the professional relationship, except as required under Rule 7-102(b).

Rule 8.1. Bar Admission and Disciplinary Matters

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a lawyer disciplinary matter, shall not:

(1) make a statement of material fact known by the applicant or the lawyer to be false; or

* * *

Rule 8.4. Misconduct

(a) A lawyer shall not:

* * *

(3) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(5) engage in conduct that is prejudicial to the administration of justice. In relation thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin. This subsection does not preclude legitimate advocacy when these or similar factors are issues in the proceeding:

* * *

APPENDIX H

ILLINOIS PERJURY STATUTE
(Relevant Sections) (1991)

Chapter 38, § 32-2. Perjury

§ 32-2. Perjury.

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

(b) Proof of Falsity.

An indictment or information for perjury alleging that the offender, under oath, has made contradictory statements, material to the issue or point in question, in the same or in different proceedings, where such oath or affirmation is required, need not specify which statement is false. At the trial, the prosecution need not establish which statement in false.

(c) Admission of Falsity.

Where the contradictory statements are made in the same continuous trial, an admission by the offender in that same continuous trial of the falsity of a contradictory statement shall bar prosecution therefor under any provisions of this Code.

* * *

APPENDIX I

PREAMBLE TO ILLINOIS RULES OF PROFESSIONAL CONDUCT,

Adopted February 8, 1990, effective August 1, 1990.

The practice of law is a public trust. Lawyers are the trustees of the system by which citizens resolve disputes among themselves, punish and deter crime, and determine their relative rights and responsibilities toward each other and their government. Lawyers therefore are responsible for the character, competence and integrity of the persons whom they assist in joining their profession; for assuring access to that system through the availability of competent legal counsel; for maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients; by working to improve that system to meet the challenges of a rapidly changing society; and by defending the integrity of the judicial system against those who would corrupt, abuse or defraud it.

To achieve these ends the practice of law is regulated by the following rules. Violation of these rules is grounds for discipline. No set of prohibitions, however, can adequately articulate the positive values or goals sought to be advanced by those prohibitions. This preamble therefore seeks to articulate those values in much the same way as did the former canons set forth in the Illinois Code of Professional Responsibility. Lawyers seeking to conform their conduct to the requirements of these rules should look to the values described in this preamble for guidance in interpreting the difficult issues which may arise under the rules.

The policies which underlie the various rules may, under certain circumstances, be in some tension with each other. Wherever feasible, the rules themselves seek to resolve such conflicts with clear statements of duty. For example, a lawyer must disclose, even in breach of a client confidence, a client's intent to commit a crime involving a serious risk of bodily harm. In other cases, lawyers must carefully weigh conflicting values, and make decisions, at the peril of violating one or more of the following rules. Lawyers are trained to make just such decisions, however, and should not shrink from the task. To reach correct ethical decisions, lawyers must be sensitive to the duties imposed by these rules and, whenever practical, should discuss particularly difficult issues with their peers.

Timely, affordable counsel is essential if disputes are to be avoided and, when necessary, resolved. Basic rights have little meaning without access to the judicial system which vindicates them. Effective access to that system often requires the assistance of counsel.

It is the responsibility of those licensed as officers of the court to use their training, experience and skills to provide services in the public interest for which compensation may not be available. It is the responsibility of those who manage law firms to create an environment that is hospitable to the rendering of a reasonable amount of uncompensated service by lawyers practicing in that firm.

Service in the public interest may take many forms. These include but are not limited to *pro bono* representation of persons unable to pay for legal services and

assistance in the organized bar's efforts at law reform. An individual lawyer's efforts in these areas is evidence of the lawyer's good character and fitness to practice law, and the efforts of the bar as a whole are essential to the bar's maintenance of professionalism.

The absence from the proposed new rules of ABA Model rule 6.1 regarding *pro bono* and public service therefore should not be interpreted as limiting the responsibility of attorneys to render uncompensated service in the public interest. Rather, the rationale for the absence of ABA Model Rule 6.1 is that this concept is not appropriate for a disciplinary code, because an appropriate disciplinary standard regarding *pro bono* and public service is difficult, if not impossible, to articulate. That ABA Model Rule 6.1 itself users the word "should" instead of "shall" in describing this duty reflects the uncertainty of the ABA on this issue.

The quality of the legal profession can be no better than that of its members. Lawyers must exercise good judgment and candor in supporting applicants for membership in the bar.

Lawyers also must assist in the policing of lawyer misconduct. The vigilance of the bar in preventing and, where required, reporting misconduct can be a formidable deterrent to such misconduct, and a key to maintaining public confidence in the integrity of the profession as a whole in the face of the egregious misconduct of a few.

Legal services are not a commodity. Rather, they are the result of the efforts, training, judgment and experience of the members of a learned profession. These rules reflect the sensitive task of striking a balance between

making available useful information regarding the availability and merits of lawyers and the need to protect the public against deceptive or overreaching practices. All communications with clients and potential clients should be consistent with these values.

The lawyer-client relationship is one of trust and confidence. Such confidence only can be maintained if the lawyer acts competently and zealously pursues the client's interests within the bounds of the law. "Zealously" does not mean mindlessly or unfairly or oppressively. Rather, it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and to the courts. 134 Ill. 2d at 470 (1990).